



Remembering Past Atrocities: The Duty of Memory in International Law

Maria Chiara Campisi

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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This thesis has been submitted for language correction.

Thesis Summary

From serious violations of human rights, international law derives a set of consequences that fall to the responsible states. These consequences take the form of secondary obligations arising from primary rules and standards, which guide governments in the process of coming to terms with a violent past. This thesis argues that some of these legal constraints, because of the manner in which they have been developed in practice, may affect the way wrongdoing states choose to deal with their past. As a result, they influence the processes of memory-making within societies. Through the legal analysis of international norms and their application to, and implementation in, situations of gross and systematic human rights abuses, this research develops the concept of a duty of memory under international law. In so doing, it offers a critical assessment of the ways international law may affect official representations of the past in the present, playing the role of *vector* of memory.

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This thesis is the result of a long journey which lead me through various landscapes, places, cultures, institutions, people, and learning experiences. This journey has been intense, meaningful, and rich; yet, sometimes tough, windy, and full of hindrances, and side roads. Throughout this journey, however, I have been fortunate to receive the constant intellectual and emotional support and encouragement by a number of outstanding individuals, to whom my deepest gratitude goes.

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List of Abbreviations

ACHPR - African Charter on Human and Peoples' Rights
ACHR - American Convention on Human Rights
ACommHPR - African Commission on Human and Peoples' Rights
CAT - Convention Against Torture
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
CERD – United Nations Committee on the Elimination of Racial Discrimination
CESCR – United Nations Committee on Economic, Social and Cultural Rights
CHR – United Nations Commission on Human Rights
CoE – Council of Europe
ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR – European Commission of Human Rights
ECtHR - European Court of Human Rights
ESC - United Nations Economic and Social Council
EU – European Union
HRC – Human Rights Committee
HRCBiH - Human Rights Chamber for Bosnia and Herzegovina
HRCouncil – United Nations Human Rights Council
IACommHR – Inter-American Commission on Human Rights
IACtHR – Inter-American Court of Human Rights
ICA - International Council on Archives
ICC - International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ICJ – International Court of Justice
CRC – International Convention on the Rights of the Child
ICRC – International Committee of the Red Cross
ICTJ – International Center for Transitional Justice
ILA - International Law Association
ILC - International Law Commission

OAS – Organization of American States

PACE - Parliamentary Assembly of the Council of Europe

PCIJ – Permanent Court of International Justice

UDHR - Universal Declaration of Human Rights

UN DoPA – United Nations Department of Political Affairs

VCLT - Vienna Convention on the Law of Treaties

WG EID – United Nations Working Group on Enforced and Involuntary Disappearances

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*The passing of time imposes (...) the duty of remembrance and emphasizes the need for it. Each person has a “spiritual patrimony” to preserve, hence the need to cultivate memory to preserve identity, both at personal and collective levels. Oblivion enhances the vulnerability of the human condition, and cannot be imposed (not even by “legal” contrivances, such as amnesty or the statute of limitations): there is an ethical obligation of remembrance.*¹

(Judge Antonio Augusto Cançado Trindade)

¹ IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Merits, Reparations and Costs. Judgment of September 12, 2005 Series C No. 132, Separate Opinion of Judge A. A. Cançado Trindade, “El Deber de Memoria y Su Necesidad”, para. III

Introduction

The Duty of Memory

From serious violations of human rights, international law derives a set of consequences that fall to the responsible states. These consequences take the form of secondary obligations arising from primary rules and standards, which guide governments in the process of coming to terms with a violent past. This thesis argues that some of these legal constraints, because of the manner in which they have been developed in practice, may affect the way wrongdoing states choose to deal with their past. As a result, they influence the processes of memory-making within societies. Through the legal analysis of international norms and their application to, and implementation in, situations of gross and systematic human rights abuses, this research develops the concept of a duty of memory under international law. In so doing, it offers a critical assessment of the ways international law influences official representations of the past in the present, playing the role of *vector* of memory.

The thesis develops the concept of a ‘duty of memory’ in the framework of international law. Of course, here, the state’s duty of memory is not understood as a state duty to remember. States cannot remember, since remembering is a particularly human activity. Yet, states can – and, as I will argue in the thesis, sometimes must – undertake certain activities that influence the way memories are shaped, circulated, and changed within society. I therefore refer to the duty of memory to indicate the *set* of states’ behaviours that are compelled by international norms, and that may have an impact on the processes of memory-making. The two constitutive elements of this concept have a precise, theoretical content. First, the concept of duty, which suggests that these behaviours are induced by international legal norms that prevent states from freely determining their relationship with the past. And second, the concept of memory, as the focus of this research, that points to the subject that these behaviours touch upon, *id est* the processes of reading, understanding, and representing past violence.

As a set of behaviours constrained by law, the duty of memory is conceived as the result of a puzzle. The pieces which form this puzzle are the different duties borne by states

that orient governments in relation to the past. These duties, in turn, are parts of the content of distinct international norms pieced together. Therefore, the research aims at building the puzzle, by identifying its components, while clarifying their legal bases. As a result of the analysis, in conclusion, this puzzle will be completed. The pieces that constitute the ‘duty of memory’ – defined at a first stage as consisting of the need for states to take action to ensure that events of the past marked by widespread violence be recognized and remembered - form a whole. Put together, the ‘duty of memory puzzle’ suggests the impact of international legal norms on the process of a nation to read, and work through its mourning past.

The Demand for Memory and the Relevance of this Research

In 1598, in an effort to put an end to the bloody religious war between Catholics and Huguenots that, in the sixteenth century, afflicted France for over thirty years, King Henry IV issued the Edict of Nantes, which was directed toward re-establishing peace and unity in the kingdom. To that end, the Edict set out, ordering:

Premierement, que la memoire de toutes choses passées d'une part et d'autre, depuis le commencement du mois de mars mil cinq cens quatre vingtz cinq jusques à nostre avenement à la couronne, et durant les autres troubles preceddens et à l'occasion d'iceulx, demourera estaincte et assoupie, *comme de chose non advenue*. Et ne sera loisible ny permis à noz procureurs generaulx ny autres personnes quelzconques, publiques ny privées, en quelque temps ny pour quelque occasion que ce soit, en faire mention, procès ou poursuite en aucunes courtz ou jurisdictions que ce soit.²

The King deemed that amnesia was the only possible condition for the society to achieve closure on the abhorrent past, and to walk toward a different era of peace. Consequently, he prevented all his subjects from renewing the memory by decreeing an obligation to forget.³

Four hundred years later, in 1995, in the struggle to come to terms with the thirty years of dictatorship and violence that Chile had faced, another demand to forget resounded loud in the process of transition to peace, notably worded by the General Augusto Pinochet:

Es mejor quedarse callado y olvidar. Es lo único que debemos hacer. Tenemos que olvidar. Y esto no va a ocurrir abriendo casos, mandando a la gente a la

² Édit de Nantes, 1598, XII, 01 [emphasis added]. The original text is available at <http://elec.enc.sorbonne.fr/editsdepacification>.

³ “Deffendons à tous noz subjectz, de quelque estat et qualité qu'ilz soient, d'en renouveler la memoire”. Ibid., 02.

cárcel. OL-VI- DAR, esta es la palabra, y para que esto ocurra, los dos lados tienen que olvidar y seguir trabajando.⁴

In both cases, oblivion was called upon to turn the page of the past, and move toward the future. And yet, whilst the promise of freedom of conscience offered by the Edict tried to compensate for the suffering of oblivion, and put at least a temporary end to the ferocity of war, Pinochet's call to the nation to forget was perceived as an unacceptable offence to the dignity of victims, and stridently clashed with the demands of truth and justice that victims' groups and the civil society were loudly asking for. In this case, the demand to forget could not be satisfied. Another claim urged the nation to work through its past and acknowledge its brutalities, as a *conditio sine qua non* to proceed in the transition. The first Truth and Reconciliation Commission was therefore established in Chile with the objective to clarify the historical truth of violations, to restore victims' dignity, and to pass on the warning of the atrocity to future generations: *Nunca Mas!*

The tension between remembering and forgetting, admittedly, is intrinsic to every process of coming to terms with past trauma. Nietzsche formulated this issue, questioning when it becomes necessary to forget the past in order not to bury the present, and how to determine that threshold between remembering and forgetting.⁵ I am not convinced that a final answer to this question can be advanced in general terms, neither from an ethical nor from a political point of view, or a general threshold can be set.⁶ And yet, the remembering-forgetting dilemma has certainly characterized the twentieth century and its brutalities, while the emergence of the human rights discourse has definitely influenced this trade-off. Therein lies the interest and relevance of this research.

The whole contemporary universal human rights claim was built upon the ethical imperative to remember the atrocity which marked the Second War World. The narrative of the Holocaust was permanently engraved on the Universal Declaration of Human Rights as a

⁴ Pinochet, A., "Speech to the Nation", 13 September 1995, delivered two days after the 22th anniversary of the 1973 golpe.

⁵ Nietzsche, F., *Untimely meditations*, ed. Breazeale, D., trans. Hollingdale, R.J. (Cambridge: Cambridge University Press, 1997), 62.

⁶ On the ethics of memory, see Margalit, A., *The ethics of memory* (Cambridge, MA: Harvard University Press, 2002); Wyschogrod, E., *An Ethics of Remembering: History, Heterology, and the Nameless Others* (Chicago: University of Chicago Press, 1998).

founding myth of the universal human rights movement.⁷ Responding to that stringent imperative, state leaders have increasingly made public apologies for historical injustices committed by nation-states in different regions of the world, and narratives of mass violence have become part of the identity of the states' history.⁸

This call for memory finds further support in a number of trends at the international level. The progressive rejection of amnesty laws in relation to the most serious crimes; the widespread practice of establishing truth commissions in the aftermath of systematic violence, with the aim of providing violence-torn societies with a historical account of the violations;⁹ the increasing commitment of international institutions and civil society organizations to preserving and disseminating knowledge about the past, are all indicators of the need for memory in the process of making sense of past atrocities. Accordingly, transitional justice scholarship nowadays agrees on recognizing memory as one of the pillars which should guide states in the institutional and political transition from an authoritarian or abusive past to the rule of law.¹⁰

⁷ The second preamble clause recalls the “barbarous acts which have outraged the conscience of mankind”. UN GA, *Universal Declaration of Human Rights* [UDHR], 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

⁸ The literature on official apologies is abundant. See, *inter alia*, Barkan, E., Karn, A., eds., *Taking wrongs seriously. Apologies and reconciliation* (Stanford: Stanford University Press, 2006); Gibney, M. and others, eds., *The age of apology: facing up to the past* (Philadelphia: University of Pennsylvania Press, 2008); Batchelor, D., “Performing reconciliation: a performance approach to the analysis of political apologies” in *Critical Perspective to Transitional Justice*, eds. Palmer, N. et al., (Cambridge: Intersentia, 2012).

⁹ On the difficulty of conceptualizing the idea of truth and the tension between historical and judicial truth, much has been written. The concept of truth has been examined by the most known philosophers, crossing from classical to post-modernist thought. From Aristotle, Thomas Aquinas, Immanuel Kant, John Locke, Stuart Mill, Friedrich Nietzsche, Jacques Derrida, Heidegger and more, this concept has been constructed and understood in the most different ways. For a review of the main positions, see Naqvi, Y., “The right to the truth in international law: fact or fiction?” *International Review of the Red Cross* 88, no. 862 (2006): 249 – 254. On the distinction between legal and historical truth, see also, *inter alia*, Koskeniemi, M., “Between Impunity and Show Trials”, *Max Planck Yearbook of United Nations Law* 6 (2002): 1-35; Todorov, T., *Mémoire du Mal, tentation du Bien: enquête sur le siècle*. (Paris: Robert Laffont, 2000); Resta, G. and Zeno-Zencovich, V., “La storia ‘giuridificata’”, in *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, eds. Resta, G. and Zeno-Zencovich, V. (Napoli: Editoriale Scientifica, 2012), 46-47; Rodotà, S., “Il Diritto Alla Verità”, *ibid*.

¹⁰ See, for instance, the work of the “Truth and Memory Project” of the International Center for Transitional Justice, at: <http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>. The contribution of the transitional justice scholarship to the issue of memory is further explored in Chapter I of this thesis, where the relevant literature in this field is reviewed. *Infra*, Chapter I. From the perspective of the historians, moreover, Berber Bevernage argues that, in cases of historical injustices, “the option of a collective amnesia has lost credit, not only because it is deemed unjust but also because it is no longer considered adequate as a tool for putting the past to rest”. Bevernage, B., *History, Memory and State Sponsored Violence: time and justice*. (New York: Routledge, 2012), 12.

The demand for memory has progressively, and necessarily, entered legal institutions, pointing to a process of ‘juridification of memory’.¹¹ Literature addressing this process of memory juridification – looking at the relationship between law and memory-making processes – is flourishing.¹² From the perspective of international law, claims related to the past are currently challenging international courts in applying traditional principles of international law and human rights law. Few years ago, the Grand Chamber of the European Court of Human Rights issued the ruling for the *Kononov* case, where the application of the non-retroactivity principle in criminal law indirectly caused the Court to shake well-established narratives about the partisan resistance against the Nazi-German occupation of Latvia during World War II.¹³ The decisions of the Italian *Corte di Cassazione* to award damages to victims of Nazi war crimes¹⁴ generated a heated debate about the traditional regime of state immunity; the debate was subsequently referred to the International Court of Justice.¹⁵ National laws which criminalize the denial of historical atrocities challenge the core principles of freedom of expression in national and international courts, raising important issues about the appropriate ways to discuss the past.¹⁶ Human rights bodies that are called to adjudicate cases related to patterns of systematic state-sponsored violence are furthermore

¹¹ The concept of “juridification” – as it is used in this thesis – recalls the German idea of *Verrechtlichung*, explained and used by Resta and Zeno-Zencovich as the progressive assimilation of human activities – originally free or regulated only by social constraints – to legal rules, which are normative both in the source that enacts them and in the orders they prescribe. Resta, G. and Zeno-Zencovich, V., “La storia ‘giuridificata’”, 16.

¹² See Ch. I, para. 2.1.

¹³ ECtHR [GC], *Kononov v. Latvia*. App. No. 36376/04. Judgment of 17 May 2010. The case had such a big impact on the perception and representation of the events of World War II in Russia that Mikhail Margelov, chairman of the Committee on Foreign Affairs of the Federation Council of the Russian Federation, stated: “Strasbourg against Nuremberg. Russia must reconsider the perspectives for its participation in international judicial instances.” Speech of 24 May 2010, quoted by Bowring, B. “The ECtHR Grand Chamber judgment in *Kononov v Latvia* (17 May 2010): is the Russian Federation correct in its understanding of the relationship between politics and international law?” *International Justice* 2 No.3 (2012), 7.

¹⁴ Since the landmark *Ferrini* case, the Court has reiterated its position in several subsequent decisions. Corte di Cassazione (Sezioni Unite), *Ferrini v. Repubblica Federale di Germania*. Judgment n° 5044, 2 March 2004. See also, more recently, *Milde*, Corte di Cassazione (First Criminal Section). Judgment n°. 1072, 21 October 2008; Corte di Cassazione (Sezioni Unite), *Mantelli and ors.* Judgment n°. 4201/8, 29 May 2008.

¹⁵ ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening). Judgment of 3 February 2012, I.C.J. Reports 2012: 99. See also the subsequent decision of the Italian Constitutional Court. Judgment n° 238/2014, 22 October 2014.

¹⁶ On the issue of negationism, national and international practice, and the consequent international debate from the human rights perspective, see *infra*, Ch. VI.

playing an increasing role – wittingly or unwittingly – in the task of interpreting the past, and writing history through legal judgments.¹⁷

The call for remembering past atrocities has also been echoed in some international legal instruments. Already in the nineties, the UN Special Rapporteur Louis Joinet, in a study on the impunity of perpetrators of human rights violations, recognized that “the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved”.¹⁸ The “duty to remember” that follows from that statement was therefore constructed as a mechanism of prevention against the mystification of history, in the form of revisionisms or negationisms.¹⁹ As such, it was formally included as part of the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereinafter Principles against Impunity or Principles to Combat Impunity).²⁰ Principle 3 provides the terms of the duty:

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.²¹

¹⁷ See, for instance, the discussion on the impact of the IACtHR's judgment *Castro Castro v. Peru* on the memory-processes in Peru, *Infra*, Ch.V. For an analysis of the role of international courts in making history, see, *inter alia*, Wilson, R. A., *Writing history in international criminal trials* (New York: Cambridge University Press, 2011); Osiel, M., *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction, 1997); White, E. B., “History in Courthouse: The Presentation of World War II Crimes in U.S. Courts Sixty Years Later”, in *Nazi crimes and the law*, eds. Stoltzfus, N., and Friedlander, H. (Washington, D.C.: German Historical Institute; Cambridge, New York: Cambridge University Press, 2008), 173–195; Specifically with regard to the Nuremberg trial and its legacy, see the different contributions included in Mettraux, G., ed., *Perspective on the Nuremberg Trial* (Oxford, New York: OUP, 2008).

¹⁸ CHR, Sub-Commission on the Promotion and Protection of Human Rights, *Revised Final report prepared by Mr. Joinet on the question of the impunity of perpetrators of human rights violations (civil and political)*, 2 October 1997. UN. Doc. E/CN.4/Sub.2/1997/20/Rev.1, para. 17, available at: <http://www.refworld.org/pdfid/3b00f4298.pdf>.

¹⁹ *Ibid.* On the phenomenon of negationisms and its criminalization by national laws see also *infra*, Ch. VI.

²⁰ CHR, *Report of the independent expert to update the Set of Principles to Combat Impunity*, Diane Orentlicher. Addendum: *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, [hereinafter, *Updated Set of Principles to Combat Impunity*]. UN Doc. E/CN.4/2005/102/Add.1, 18 February 2005, available at: <http://www.refworld.org/docid/42d66e7a0.html>.

²¹ *Ibid.*, Principle 3. The “Duty to preserve memory” as framed by Principle 3 will be further explored in Chapter IV of the thesis, with regard to its impact on promoting international standards on human rights archives' public policies. *Infra*, Chapter IV.

The ethical imperative to remember has further been transposed in the legal language in courtrooms. The establishment of the Nuremberg and Tokyo trials, as well as historical domestic trials such as the *Eichmann* one, were driven, at least in part, by the moral responsibility to inform future generations about the horrors of the war. The oft-cited Justice Jackson's words, US Chief Prosecutor at Nuremberg, well express this urgency, when saying:

Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible accusatory generalities uttered during the war. We must establish incredible events by credible evidence.²²

More recently, Judge Cançado Trindade, in his separate opinion to the case *Gutiérrez-Soler v. Colombia*, meaningfully articulated the ethical duty to remember in the following manner:

The passing of time imposes (...) the duty of remembrance and emphasizes the need for it. Each person has a “spiritual patrimony” to preserve, hence the need to cultivate memory to preserve identity, both at personal and collective levels. Oblivion enhances the vulnerability of the human condition, and cannot be imposed (not even by “legal” contrivances, such as amnesty or the statute of limitations): there is an ethical obligation of remembrance.²³

Yet, in spite of the strong ethical demand for memory and memorialization in the aftermath of mass atrocities, and despite the growing attention to the different processes of memory-juridification, the legal nature and foundation of this demand has not been adequately explored by international legal scholarship. To what extent can this call for remembering be framed in legal terms? In other words – from the perspective of international law –, to what extent is there a state ‘obligation to memory’ with regard to past atrocities, and, if any, what would this entail concretely? Stepping back from the ethical assessment of the demand for memory, this thesis aims to fill this gap in the literature, and originally contributes to the development of a theoretical legal framework in which such a demand can be placed.

²² Justice Jackson's Report to the President on Atrocities and War Crimes; June 7, 1945, Part III, para. 4, Excerpt from the Department of State Bulletin, published on 10 June 1945, available at: http://avalon.law.yale.edu/imt/imt_jack01.asp.

²³ IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Merits, Reparations and Costs. Judgment of 12 September 2005 Series C No. 132, Separate Opinion of Judge A. A. Cançado Trindade, “El Deber de Memoria y Su Necesidad”, para III.

Approach and Methodology

Despite the fact that it has been evoked in declarations and statements of international and national bodies, a state duty to remember, as such, has not been included in any binding international legal instruments. In order to answer the research question that this thesis raises about the existence and the content of states' duties regarding the processes of remembering past wrongs, the legal foundations and the contours of a possible duty of memory are therefore to be inferred from the different provisions that bind states according to their international obligations. The identification of these legal bases and the interpretation of their content are therefore the first steps this study takes in the enterprise to construct the duty of memory-puzzle.

This thesis adopts a positivist approach to the research question. It analyses the state of contemporary international law and practice in order to verify whether, and to what extent, the demand for memory finds a legal hold in international law provisions. In conjunction with this positivist approach, moreover, the study comprises a critical analysis of the practice, indicating hurdles and shortcomings of the current trends. Conversely, the research does not attempt to suggest a normative argument in favour or against the establishment of the duty of memory. This is because, as it will be shown in the course of the dissertation and elaborated further in the conclusions, the impact of international norms on the construction of social memories may lead to alternative, unpredictable results, due to the specificities which characterize each society and its narratives. In this sense, the value of this research, in line with the most inspired transitional justice scholarship, lies in the provision of a general framework of international principles and standards in which the vernacular negotiations over memories and narratives can be accommodated and protected.

On this positivist stance, human rights norms are the primary sources from which the legal foundations of a duty of memory are inferred. The branches of international humanitarian law, international criminal law, and cultural heritage law, in contrast, are not the direct focus of the analysis, and can be considered as subsidiary criteria of interpretation of the human rights framework related to memory. Besides, these fields are potentially fruitful for future research on this subject, and may constitute a new line of investigation to be explored, in more detail, along the theoretical background provided by this study. Within the human rights law framework, in order to interpret the regional and universal human rights instruments relevant in the contexts of serious human rights violations, the study reviews the practice of

the main international and regional judicial and quasi-judicial bodies. In particular the Human Rights Committee's, the European Court of Human Rights', and the Inter American Court of Human Rights' relevant decisions and pronouncements provide most of the materials for the analysis. Relevant soft law instruments, adopted both in the universal and regional systems of human rights protection, are also assessed as evidence of emerging practice and *opinio juris*, in order to verify the research hypothesis.²⁴

The relevance of the practice on memory at the international level is subsequently verified against the practice carried out by states dealing with the legacy of gross violations of human rights. This is the second step taken in the thesis, assessing the trend pointing to the emergence of a state duty of memory. State practice that recognizes and regulates the responsibilities of governments toward the recollection and representation of knowledge about past atrocities, as well as the implementation of relevant international standards in domestic legislation and policies, are considered. Such a practice allows us, on the one hand, to detail the concrete content of the different components of the duty of memory. On the other hand, it shows the extent to which such a duty is understood as mandatory by states, and, therefore, it suggests the degree of *opinio juris* which supports it. In this sense, the thesis does not – and could not – attempt to provide a comparative study of memory politics around the world. Instead, in each chapter, it selects relevant cases that exemplify the general trend supporting or clarifying the specific duty under discussion. Since the focus of this study is the memory of

²⁴ The role of soft law instruments – in particular with respect to UN General Assembly resolutions – as indicators of state practice and *opinio iuris* has been recognized also in a series of judgments of the International Court of Justice. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*. Judgment of 27 June 1986, ICJ Reports 1986, 14; *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion of 8 June 1996, ICJ. Reports 1996, 226, at 254–255, para. 70. On the role of soft law in the process of creation of contemporary international law, see, *inter alia*, Guzman, A and Meyer, T., “International Soft Law”, *The Journal of Legal Analysis* 2, no. 1(2011): 171-225; Boyle, A., “Some reflections on the Relationship of Treaties and Soft Law”, in *Multilateral treaty-making: the current status of challenges to and reforms needed in the international legislative process*, ed. Gowlland-Debbas, V. (The Hague; Boston: M. Nijhoff, 2000) 25-38; Shelton, D., ed., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000); Shelton, D., “Soft Law”, in *Routledge Handbook of International Law*, ed. Armstrong, D., (London ; New York: Routledge, 2009), 61-80; Fitzmaurice, M., and Elias, O., *Contemporary issues of the law of treaties*. (Utrecht: Eleven International Pub, 2005), 34-46; Dupuy, R.J., “Declaratory Law and Programmatic Law; from Revolutionary Custom to ‘Soft Law’”, in *Declaration on Principles: A Quest For Universal Peace*, eds. Akkerman, R.J, Krieken, P.J., and Pannenburg, C.O. (The Hague: Kluwer Law International, 1977), 247-257. On the ICJ jurisprudence with regard to the legal effect of soft law declarations of UN bodies, see Oberg, M.D., “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ.” *European Journal of International Law* 16, no. 5 (2009): 879-906.

large-scale and systematic human rights abuses, much of the state practice is provided by Latin American countries dealing with the recent history of military rules and internal conflicts, as well as Eastern European countries facing the legacy of the communist regimes. Based on the critical observation of controversial cases that result from the implementation of international norms and standards in the practice, moreover, the dissertation identifies possible pitfalls and risks of attempting to regulate the way a society remembers and forgets past trauma through international, universal criteria.

In addition to legal sources and state practice, secondary sources are also employed. Whilst the thesis explores the research question from the point of view of international law, and thereby conducting the analysis through the lens of the international law categories, the academic sources used for this research are grounded in different fields of study. Many of the extra legal academic materials used for the research, especially in the first theoretical chapter, are in fact mainly borrowed from transitional justice scholarship, as well as from memory studies and history. This allows the analysis to grasp and tackle the multidisciplinary nature of the subject. In so doing, the thesis in fact creates a bridge between these different fields, attempting to make them communicate with each other through the tool of memory, whilst keeping the legal approach to the question it poses. Ultimately, the research may provide the legal framework in which the multidisciplinary literature on memory can be read.

As a result of the legal analysis conducted on the international obligations that bind states as a consequence of mass violations of human rights, and the corresponding practice at the domestic level, finally, the elements which make up the ‘duty of memory’ are spelled out and presented. The thesis identifies a set of behaviours that states should adopt when dealing with the ways in which the traumatic past should be represented and told. This research discloses five components of the state ‘duty of memory’: to clarify historical facts which constitute serious human rights violations; to disclose information related to mass atrocities; to preserve the records, keeping safe the memory of those atrocities; to commemorate those events; to respect the free discussion of them, while protecting historical accounts from malicious manipulations and falsifications, including negationist approaches to past atrocities.

Synopsis

The dissertation is organized according to the five elements which form the ‘duty of memory puzzle’ – the duty to ascertain, to disclose, to preserve, to commemorate, to respect and protect. While the first chapter provides the theoretical framework which underpins the

legal analysis, each of the following chapters correspond to (and examine) one of these duties. For each one, the thesis firstly clarifies the relevance of the corresponding duty to the processes of memory; subsequently, it presents an analysis of the legal foundations that ground the duty and the interpretation provided by international bodies; and finally, it reviews relevant state practice that implements it.

In detail:

Chapter I seeks to explore the concept of memory and its features, with the aim to provide a common understanding of this term, and the way it is used in the research. For this purpose, it identifies relevant elements in the notion of memory to narrow down and tailor this concept for the purpose of the investigation. It starts with reviewing the relevant literature on memory studies to provide a stronger and more comprehensive understanding of the phenomenon of memory. Then, it proceeds to compare the conceptual underpinnings emerging from this first analysis with other fields. Relevant legal and transitional justice literature is reviewed, as appropriate, to explore the relations between memory and law and memory and transitional processes, in order to understand how the two latter impact on the former in the aftermath of mass atrocities. As a result of the analysis, Chapter I eventually puts forth one of the main claims of this research and develops the idea of international law as a *vector* of memory.

Chapter II introduces the first element through which international law and its branches may influence and shape the memory of a society: the duty to ascertain the facts of the past. It argues that, by imposing an obligation on states to investigate human rights abuses, and indicating standards and guidelines to accomplish that task, international law influences the ways in which states engage in the clarification of past events characterized by systematic violence, and – consequently – the historical accounts that result from those investigations. The duty to ascertain and the standards necessary to comply therewith are inferred from different legal foundations: i) “ensure and protect clause”; ii) right to an effective remedy; iii) right to truth; and iv) right to reparations. These legal bases are in turn analysed in the light of the decisions of judicial and non-judicial mechanisms of clarification and accountability. This practice provides the framework for evaluating and understanding the relevant states’ conduct, and for assessing their compliance with the identified standards.

Chapter III analyses and conceptualizes the state duty to disclose information and documents in respect of past violations, in relation to memory processes. After requiring states to dig into their violent past to investigate human rights abuses (Chapter II), the second step that international law takes in influencing the processes of memory making, is to encourage states to make information related to past abuses available to victims and other individuals. In so doing, it expects states to comply with a number of requirements – more or less compulsory – concerning access to information, and indicates standards and guidelines to be applied. The right to access to information, both in the collective and individual dimension, sets the framework in which the duty to disclose is conceptualized. Along these lines, through the second component of the duty of memory – the duty to disclose –, the chapter explores how international law regulates access to and circulation of knowledge about the past within the society, with evident consequences on the production of memories. The chapter observes the concrete impact of such a duty in state practice, and points out the risk it may hold for the societal memory-negotiation processes. To that aim, the analysis focuses on state policies and legislation on opening secret archives of previous authoritarian regimes, especially in Eastern European countries. .

Chapter IV presents the state duty to preserve the knowledge of the past, through the collection and preservation of documents related to past abuses. Through the lens of the legal basis of the right to know, under its different conceptualizations, it analyses international norms (mostly soft law) specifying guidelines and standards for the management and preservation of documents and materials regarding mass human rights abuses from the past. In this way, I suggest, international principles not only require states to create ‘collections of memories’ of past violence, but also give indications to governments how to select them and preserve them. The review of examples of public policies and legislation on archives storing evidence and records of gross human rights violations, allows the assessment of the extent to which these international principles and guidelines find resonance in state practice. This, in turn, clarifies whether state practice supports the stabilization of the duty to preserve at the international level.

Chapter V explores the state duty to undertake public acts of commemoration – in the form of official ceremonies or memorials – as one of the ways in which governments, in the aftermath of state violence, can (at least partly) discharge their obligation to provide reparations to victims, and to offer guarantees for the non-repetition of similar events in the

future. This is the fourth piece of the duty of memory puzzle, which was named ‘the duty to commemorate’. In order to verify the emergence of such a duty as part of the secondary norms which determine the legal consequences of the states’ responsibility for serious and systematic human rights abuses, the chapter analyses international norms and judicial decisions that require states to commemorate past abuses as means of reparations for victims. It identifies principles and standards developed by human rights bodies in this domain. In the duty to commemorate, the two-fold dimension of reparations – individual and collective – reflects the two-fold dimension of memory – both personal and social. In the analysis of practice, primary relevance is given to the jurisprudence of the Inter-American Court of Human Rights, which proves particularly fruitful in the definition of such a duty. The concrete implementation of the duty to commemorate and its effects are subsequently evaluated through specific cases of the practice of Latin American countries. In this fashion, in the chapter, the extent to which specific remedial orders may become instruments of memory-making, and the manner in which supranational courts’ decisions may directly shape the public recollection of past events, is assessed.

Chapter VI adds the last element to the duty of memory puzzle. It examines the normative framework under international law regulating historical debate. The chapter aims to understand what role international law expects states to play in striking the balance between freedom of speech and the protection of historical “truth”. The analysis suggests that the general principle that informs historical debate in the international arena is freedom. At the same time, however, it recognizes that international bodies pose some limits to disputing certain historical narratives amounting to mass crimes. On this basis, the research conceptualizes, on the one hand, a state duty to respect freedom in historical debate and research under different rationales. On the other hand, it critically analyses limits to this freedom, indicating a state duty to protect *certain* historical narratives from revisionisms and denial. The ECtHR case law offers the main source to reconstruct the normative framework and the legal rationale of these two issues. Together with that, additional relevant practice of international bodies, as well as state practice related to the criminalization of genocide denial, come to the fore to tackle the complexities of historical debate under the perspective of international law.

In the **Conclusions**, eventually, the duty of memory puzzle will be put together. Its different components will be recalled, and the rationales behind, and content and nature of this duty finally assessed. Ultimately, the major findings about the role of international law as a *vector* of memory will close the dissertation, while opening the door to future research.

Chapter I

On Memory

Introduction

This chapter sets out the theoretical framework in which the ‘duty of memory’ is developed in this thesis. As anticipated in the introduction to this dissertation, the ‘duty of memory’ encompasses the set of behaviours that a state is to undertake in compliance with international law, which have an impact on how society understands and represents traumatic events of its past. As such, the ‘duty of memory’ enshrines two elements: the concept of legal constraint and the concept of memory. The first is justified by the methodological approach of the present study. It suggests that such a duty is inferred through the process of interpretation of international legal norms, and of assessment of international and national practice – *diuturnitas* and *opinio juris*. The second element indicates the content of the duty. That is, the duty of memory embraces states’ conduct which relate to the interpretation and representation of events from the past and their narratives. Before we turn to examining the substantive legal bases of the states’ duty of memory, the elusive concept of memory requires clarification in order to agree upon a common understanding of its meanings and the way in which it is used in this dissertation. Hence, this chapter engages with the idea of memory as a theoretical category, and by looking at its relationship with applied disciplines that are relevant for the research.

Since the notion of memory has been applied broadly so far, this Chapter sets out to narrow it down. To that aim, it first identifies “differentiating markers”²⁵ to tailor the concept of memory to the purpose of the thesis. This task is performed by highlighting, through the analysis of the existing literature, some of the specific features of memory that prove to be relevant for our discussion. Then, once the characteristic features of memory are spelled out, the notion is further refined by looking at the intersections between memory and other

²⁵ Cubitt, G., *History and Memory* (Manchester and New York: Manchester University Press, 2007), 6. Cubitt is a Senior Professor of History and member of the Institute for the Public Understanding of the Past. In his seminal book *History and Memory*, he offers an accurate insight for getting a first conceptual handle on the concept of memory in historical studies. He warns the reader about the need to find differentiating markers to discriminate on the various conceptions of “memory” that have been offered by the various areas of scholarship.

disciplines that regulate states' conduct in the aftermath of large-scale and systematic human rights violations: law and transitional justice.

1. Identifying Differentiating Markers

*[M]emory is one of those elusive topics we all think we have a handle on. But as soon as we try to define it, it starts slipping and sliding, eluding attempts to grasp it either culturally, sociologically, or scientifically.*²⁶

1.1 The Multiplicity of Memory. Defining the Concept

The notion of memory has much (pre)occupied scholars, practitioners, and philosophers. A complex, controversial, ungraspable nature has been associated with this notion in order to reflect the elusive, visceral, ancestral relation of the present with the past. Memory is often understood as a mysterious boat, which ferries past experiences to present knowledge. It travels through time, shaking the idea of linear time, making present what was past and making the past present again.²⁷ In an untraditional understanding of time, memory rejects the equivalences between past and closure, past and death, past and gone.²⁸ Memory, it has been said, is “the presence of the past within the present”.²⁹

²⁶ Husseyen, A., *Present Pasts: Urban Palimpsests and the Politics of Memory*, (Stanford: Stanford University Press, 2003), 3.

²⁷ For these thoughts, I must thank the participants to the Emerging Scholars Workshop, held in the context of the Historical Justice and Memory Conference, hosted by the Swinburne Institute, Melbourne, 14–17 February 2012. I am particularly grateful to Louise Vella and Hermann Ruiz for their valuable contribution to the development of these reflections.

²⁸ There is an extensive and important school of philosophers and thinkers that question the concept of time. Among others: Benjamin, W., “Theses on the Philosophy of History” in *Illuminations*, ed. Arendt, H. (London: Fontana, 1973), 245-258; Braudel, F., *Ecrits sur l'histoire* (Paris: Flammarion, 1969); Agamben, G., “Time and History”, in *Infancy and history: on the destruction of experience* (London; New York: Verso, 2007), 89-106; Arendt, H., “The Concept of History”, in *Between past and future: eight exercises in political thought* (New York: Penguin Books, 1978), 41-90; Ricoeur, P., *Time and Narrative*, Vol. 3 (Chicago: University of Chicago Press, 1984); Althusser, L. and Balibar, E., *Reading Capital* (London: NLB, 1977); Derrida, J., *Specters of Marx: the state of the debt, the work of mourning, and the New international* (New York: Routledge, 1994). These (and more) authors are presented and discussed in Bevernage, B., *History, memory, and state-sponsored violence: time and justice*, (New York: Routledge, 2012). In his work, moreover, Bevernage puts forth a quite provoking thesis which proves rather relevant for this research; he claims that the conception of historical time affects the way historical injustices are understood, remembered, and dealt with, and eventually the way victims' claims are accommodated in society.

²⁹ Nora, P., “Between memory and history: Les lieux de mémoire”, *Representation*, 26, Special Issue: Memory and Counter-Memory (Spring, 1989): 7-24, at 20. Nora expresses this thought with regard to sites of memory.

At least since the ancient Greeks, memory has been considered either as an instrument to gather knowledge – be it innate and related to the metaphysic world,³⁰ or a voluntary or involuntary collection and recollection of images in association with extant ideas in the present –³¹, or as a vehicle to transmit knowledge.³² Its complex relation with myths, traditions, and historical truth has been widely discussed,³³ and historians have been divided between using it as a source of history³⁴ or warning against its fallibility.³⁵ Memory, moreover, has always involved far-reaching ethical and moral questions. Because of an ethical duty to mourn and commemorate, Antigone challenges Creon’s decree that prohibited the

³⁰ “[S]eeking and learning are nothing but recollection”. Plato, “*Meno*”, 81 c-d; also “*Pheado*”, 72 e and Phaedrus, 249 b-c. *The collected dialogues of Plato including the letters*, ed. Hamilton, E., and Huntington, C. (Princeton: Princeton University Press, 1961), 354; 55; 496.

³¹ Aristotle, *De memoria et reminiscencia*. He distinguishes clearly between *μνήμη* and *ἀνάμνησις*, memory and recollection. Whether the first is an involuntary representation of retained images and their affection and sensations over time, the latter is a complex, conscious process involving reasoning, interpretation, and logical connections. In *On the Soul, Parva Naturalia, On Breath*, trans. W.S. Hett (Cambridge: Harvard University Press; London: W. Heinemann, 1975), 288- 313.

³² For the two opposed Greek *topoi* about memory – the Platonic and Aristotelian one –, see Ricoeur, P., *La mémoire, l’histoire, l’oublié* (Seuil: Poche Essais, 2000), 7-25. For an account of the classical theories and methods of memory and remembering processes, see Yates, F. A., *The Art of Memory*, (Chicago: University of Chicago Press, 1966), 1-49, and Rossington, M. and Whitehead, A., eds. *Theories of memory: A reader*. (Baltimore: Johns Hopkins University Press, 2007), 20-42.

³³ These other concepts and their boundaries are problematic as well. An exhaustive literature has been produced on them, an account of which cannot be given here at length. See, *inter alia*, Finley, M. I., “Myth, Memory, and History”, *History and Theory* 4, no. 3. (1965): 281-302; Doty, W. G., *Mythography: The Study of Myths and Rituals* (Tuscaloosa: University of Alabama Press, 1986); an account of the theoretical interpretations of these concepts can be found in Nachman, Y., *The Masada myth: collective memory and mythmaking in Israel* (Madison: University of Wisconsin Press, 1995), 279-285.

³⁴ For an introductory account on oral history, see Tonkin, E., *Narrating our pasts: the social construction of oral history* (Cambridge; New York: Cambridge University Press, 1992); Ritchie, D.A., *The Oxford handbook of oral history* (Oxford; New York: Oxford University Press, 2011); Abrams, L., *Oral history theory* (London: Routledge, 2010). For further discussion, see also Portelli, A., “The peculiarities of oral history”, *History Workshop Journal* 12, no.1 (1981): 96-107; Passerini, L., *Fascism in popular memory: The cultural experience of the Turin working class* (1987); Frisch, M., “Oral history and Hard Times: A review essay”, *The Oral History Review* 7 (1979): 70-79. The works of these authors are introduced in Hajek, A., “Challenging dominant discourses of the past: 1968 and the value of oral history”, *Memory Studies* 6, no.1 (2013): 3- 6. For an analysis of the new paradigms of modern oral history movement, including the use of memory as a source for historical research, see Thomson, A., “Four paradigm transformations in oral history”, *The Oral History Review* 34, no.1, (2006): 49–70.

³⁵ Thucydides warns: “[2] Of the events of the war I have not ventured to speak from any chance information, nor according to any notion of my own; I have described nothing but what I either saw myself, or learned from others of whom I made the most careful and particular enquiry. [3] The task was a laborious one, because eye-witnesses of the same occurrences gave different accounts of them, as they remembered or were interested in the actions of one side or the other.” Thucydides, *History of the Peloponnesian War*, Book I, Ch. 22, trans. Benjamin Jowett. *Thucydides translated into English*. Vol. 1. (Oxford: Clarendon Press, 1881). Available at: <http://data.perseus.org/citations/urn:cts:greekLit:tlg0003.tlg001.perseus-eng2:introduction>.

burial of her brother Polynices' body,³⁶ while Dante has to soak in and drink from the *Lethe* river – the oblivion – to forget the experience of sin, leave Purgatory, and ascend to Heaven.³⁷

The notion of memory has been used to indicate a wide range of activities, processes, and initiatives. “Many very different things happen when we remember”, wrote Wittgenstein.³⁸ Memory is the presence of Franca Jarach in the life of her mother, Vera Jarach Vigevani. Franca was an 18-year-old young woman when she was arrested in Buenos Aires on 26th June 1976, and then disappeared in the hands of the Argentinean Army. Vera, nowadays almost 90 years old, has spent most Thursdays of her life standing in front of the *Casa Rosada de Buenos Aires* with a picture of her daughter and a white *pañuelo*, asking to know her child's fate. Memory is the process through which the Jews elaborate their exile from the Holy Land as an essential tie for the Jewish people's identity, although none of those who suffered from that displacement is still alive today to witness it. Memory is the monument *El Ojo que Lloro*, which stands in the *Campo de Marte* park, in Lima, to tell the history of all of the almost 70,000 victims of the violence during the Peruvian civil war.

Indeed, because of its malleable nature, the concept of memory has been used and applied in an enormous number of disciplines, which range from history to informational technology, from psychology to anthropology, from philosophy to sociology, from neurosciences to law. All these disciplines – and more – have been conceptually brought

³⁶ The myth of Antigone was recently revised and adapted by an Argentinean director, Griselda Gambaro, in a play which was performed in Buenos Aires in 1986, in the context of the first, disappointing trials against the militaries. Indirectly telling about the horror of the disappeared victims during the Argentina's Dirty War, “*Antigona Furiosa*” – this is the title of the play – represents the anger and fury of the Argentinean Madres of the Plaza de Mayo, in their struggle to mourn and remember their children's bodies. For a comment on the play and its meta-meanings see Wannamaker, A., ““Memory Also Makes a Chain”: The Performance of Absence in Griselda Gambaro's “*Antigona Furiosa*””, *The Journal of the Midwest Modern Language Association* 33, no.3; 34, no.1 (Autumn 2000 - Winter 2001): 73-85.

³⁷ Dante Alighieri, *La Divina Commedia*. Purgatorio. Canto XXVIII (vv.127-133).

*Da questa parte con virtù discende
che toglie altrui memoria del peccato;
da l'altra d'ogne ben fatto la rende.
Quinci Letè; così da l'altro lato
Eunoè si chiama, e non adopra
se quinci e quindi pria non è gustato:
a tutti altri sapori esto è di sopra.*

³⁸ Wittgenstein, L., *Philosophical grammar*, 1974, ed. Rush Rhees, trans. Anthony Kenny (Berkeley: University of California Press, 2005), 181.

together in the research field of “memory studies”.³⁹ Despite the common umbrella for the memory studies field, each of these disciplines applies its own methodology in order to highlight the features of “memory” that best fit its focus. As a consequence, definitions of memory of the most different natures flourish in literature. Each of them suggests not only a different perspective to the same concept, but sometimes even conflicting conceptual understandings of the same idea. In spite of their differences, however, the common denominator of most definitions is the idea of memory as something fluid, in motion, dynamic, and modifiable.

It is not the purpose of this chapter to provide a comprehensive literature review of what has been written about memory. Firstly, this titanic enterprise would result in little contribution for the purpose of the present research on the role of international law in shaping the memories of past atrocities. Secondly, in the light of the considerable and sometimes contradictory literature on the topic, the effort of establishing a general definition of memory is certainly both naive and intellectually misleading. However, while the variety of ideas connected to the concept of memory warns us to refrain from providing an ontological definition of *what* memory is, the multi-layered meaning of this concept requires that order is brought to this agglomerate of ideas, and to be discriminating in the terminological use of the term. Indeed, “[a] word may be allowed to mean many things, but it is usually unwise to allow it to mean all of them simultaneously.”⁴⁰ I should therefore identify “differentiating markers”, as Cubitt suggests, for our concept.⁴¹ My ambition in the following, hence, is to pinpoint the main elements – the ‘differentiating markers’ – of the notion of memory to define the meaning of this concept as used in this thesis. That, of course, without forgetting the complexities and debates that this concept brings with it. The starting point to narrow down the notion of memory is the concept of *collective memory*.

³⁹ For an introductory reading of this discipline, with the presentation of the most relevant scholars, see Olick, J. K., Vinitzky-Seroussi, V. and Levy, D., eds., *The Collective Memory Reader* (New York; Oxford: Oxford University Press, 2011).

⁴⁰ Cubitt, *History and Memory*, 6.

⁴¹ Ibid.

1.2 Collective memory

Much has been written on collective memory.⁴² Since the French-Jewish, Durkheimian sociologist Maurice Halbwachs developed the concept in his landmark works *Les Cadres Sociaux de la Mémoire*⁴³ and, posthumously, *Mémoire Collective*,⁴⁴ collective memory has progressively become an oft-used term to indicate – generally speaking – the social phenomena of making sense of and representing events of the past by a community or group in a way which is collectively acknowledged and shared.⁴⁵ At a first stage, collective memory can be defined as “the knowledge about the past that is shared, mutually acknowledged, and reinforced by collectivities”.⁴⁶ The founding idea is that all the processes of individual remembering are somehow moulded and shaped by the social structures of each specific group, and as a result, all the processes of remembering are therefore “born and raised” within the group.

In evolving his thought on collective memory, Halbwachs borrows, from the Durkheimian thought, the idea that all human experiences are rooted in a social context and structure. At the same time, he follows Bergson in the perception of the variability of memory.⁴⁷ Coherently, collective memory is thusly seen as the variable product of a social construction, that of assigning shared meanings to events of the past that are momentous for the group’s identity. In this view, the perception that individuals have about their past and its representation can be understood and interpreted only within, and through the specific group context to which they belong. In Halbwachs’ words, “[t]he individual calls recollections to mind by relying on the frameworks of social memory.”⁴⁸ It is therefore the group which offers

⁴² For a review, see Olick, J. K. and Robbins, J., “Social memory studies: From “collective memory” to the historical sociology of mnemonic practices.” *Annual Review of sociology* 24 (1998): 105-140. For a critique on collective memory studies and their method, see Confino, A., “Collective Memory and Cultural History.” *The American Historical Review* 102, no. 5 (December, 1997): 1386-1403.

⁴³ Halbwachs, M., *Les Cadres Sociaux de la Mémoire* (1925, repr., Paris: Albin Michel, 1994).

⁴⁴ Halbwachs, M., *Mémoire Collective* (1950), rev. ed. Namer, G. (Paris: Albin Michel, 1997).

⁴⁵ Critics of the misuse and abuse of the term collective memory can be found, among others, in Gedi, N. and Elam, Y. “Collective Memory – What Is It?” *History and Memory* 8, no. 1 (1996): 30-50.

⁴⁶ Savelsberg, J.J. and King, R.D., “Law and Collective Memory.” *Annual Review of Law and Social Science*, 3 (2007): 189-211.

⁴⁷ Halbwachs, *On Collective Memory*, trans. and ed. Coser, L. A. (Chicago: University of Chicago Press, 1992), 22.

⁴⁸ Halbwachs, M., *La topographie légendaire des Évangiles en Terre sainte: étude de mémoire collective*, ed. Jaisson, M. (1941, repr., Paris: Presses universitaires de France, 2008), 182.

the framework in which, and through which images of the past are elaborated and recorded. However, if the social dimension of memory is certainly the main characteristic of the notion of collective memory, some criticisms to this theory are to be considered in order to better tease out its specific treats.

1.2.1 Critiques on Collective Memory

1.2.1.1 Collective v. Individual memories

As noted, collective memory is born and evolves within social groups. Arguably, however, this intrinsic “social determinism”⁴⁹ tends to neglect the individual agency in the process of remembering. Many criticisms have been issued against the theory of collective memory on this point. It has been said that the very concept of collective memory would essentially deny the individual dimension of recollection.⁵⁰ It has furthermore been argued that, by relying on the power of society to shape individual memory, “the dialectical tension between personal memory and the social construction of the past” remains mostly underexplored, and the dynamics of collective memory remain unclear.⁵¹

While it is true that the idea of collective memory, on account of its sociological origin, focuses mainly on the group dynamics of the processes of remembering, this does not automatically imply the denial of a role for the individual. When talking about ‘collective memory’, we are not referring – as has been sometimes criticized – to a fictitious group-mind that actually remembers.⁵² Theory of collective memory does not exclude the individual from this process of memory-making, but it stresses that individual’s agency in relation to the past is determined by the social structures in which she or he lives. Indeed, while the society creates the framework within which the representation of the past comes to take shape and

⁴⁹ Misztal, B., *Theories of Social Remembering* (Philadelphia: Open University Press. 2003), 54.

⁵⁰ This is the thesis, for instance, put forth by Fentress and Wickham, who suggest replacing the concept of collective memory with the one of social memory. Fentress, J. and Wickham, C., *Social Memory* (Oxford, UK; Cambridge, Mass.: Blackwell, 1992), ix. For further discussion on these criticisms, see Cubitt, *History and Memory*, 9-17.

⁵¹ Misztal, *Theories of Social Remembering*, 54.

⁵² Lessa, F., *Memory and transitional justice in Argentina and Uruguay. Against impunity* (New York: Palgrave Macmillan, 2013), 18.

meaning, it is for the individuals to go through the actual *process* of recollecting images from the past.⁵³

Still, some subsequent theories on memory have tried to remove this hurdle by suggesting to move from the concept of collective memory to other notions, such as the one of social memory, shifting the attention from the group's social frameworks to the social dynamics between individual and society.⁵⁴ While certainly most of these works actually add more depth to memory studies, for the purpose of this research, the concept of collective memory – if used with the caveat that I provide in this chapter – still seems an appropriate fit. In fact, from a closer and perhaps more flexible analysis, collective memory can be understood as an inclusive category of different processes and actors, rather than as an exclusive label to mark differences. Olick suggests this broader approach to the term in order to overcome the antagonist relation between individual-collective remembering. In his view, collective memory can well sum up different kinds of what he calls “mnemonic products and practices” – from stories to images, from commemorations to monuments –, which are at the same time individual and social. In this sense, the focus of the concept is not on the category that it stands for, but on the dynamics of remembering that it grasps.⁵⁵

In the light of this, I understand collective memory neither as an autonomous, external social entity that shapes individual memories, nor as the sum of the latter. I see it as both a social process and its result, to which each individual contributes with his or her own experience and within which each individual experience finds its place and meaning, over time and through time. In this sense, by considering the collective dimension of memory as a complex process inclusive also of individual memories, I believe the concept of collective memory provides a good framework in which to assess the role of law, in general, and that of international law, in particular, in determining how victims and societies that experienced mass atrocities understand and represent their past.

⁵³ Halbwachs, *La Mémoire Collective*, in *The Collective Memory Reader*, ed. Olick, 142. Halbwachs explores and elaborates the relation between individual and collective memory in *La Mémoire Collective*, Ch. II and 97-99.

⁵⁴ Páez, D., Basabe, N. & González, J.L. “Social Processes and Collective Memory: a cross-cultural approach to remembering political events”, in *Collective Memory of Political Events*, ed. En J. Pennebaker, D. Páez & B. Rimé (Mahwah, N.J.: Lawrence Erlbaum Associates, 1997), 147-174. Similarly Cubitt, *History and Memory*, 13-14.

⁵⁵ Olick, J., “From Collective Memory to the Sociology of Mnemonic Practices and Products”, in *Cultural Memory Studies: An International and Interdisciplinary Handbook*, ed. Erll, A., Nünning, A., (Berlin; New York: Walter de Gruyter, 2008), 158.

1.2.1.2 Collective Memory and the Unitary Past

In conjunction with the critique about the exclusion of the individual from the process of remembering, we should consider another significant critique that has been raised against the theory on collective memory. Collective memory, so goes the critique, seems to presuppose that societies always share a collective, unitary vision of the past. However, this vision does not necessarily correspond to the reality. Admittedly, the idea of one cohesive and unified memory is unrealistic.⁵⁶ In democratic societies - even when an ‘official memory’ is purported by the government -, different narratives still coexist in the social fabric, ideally in dialogue, more often in contrast. Similarly, even during dictatorial regimes where a hegemonic narrative dominates society and dissenting memories are silenced through violence, hidden in the social fabric, competing narratives rest in the private sphere of individuals, families, and minority groups, waiting to find a *locus* to express themselves. This is actually the most frequent scenario for societies in democratic transition after periods of violence and conflicts, which are the main focus of this thesis. Many stories of ethnic conflicts and civil wars demonstrate that there is hardly *one* truth, and – even more so – *one* memory. It is therefore important that, in our understanding of memory, we take into account the existence of different entities within a social group, each of which may carry a specific narrative of the past. Collective memory, in this research, accordingly is the patchwork of the different representations of the past that individuals elaborate and recollect in groups within, and throughout the social frameworks.

1.3 Memory and Identity

Since collective memory is a social product, it has manifold facets. Not only each society constructs its own collective memory, but – as noted – also within a society there are as many memories as social groups.⁵⁷ As said, the coexistence of different memories within the umbrella of collective memory is central to the understanding of the concept of memory in this thesis. Yet, memory is a crucial element to found identity. The identity of a people is ultimately both defined and reinforced by its shared stories on the past. These stories

⁵⁶ See, among other, Confino, A., “Collective Memory and Cultural History”, 1397–1402.

⁵⁷ Halbwachs, *On Collective Memory*, 22; *Les Cadres Sociaux de la Mémoire*, 195 – 197. Cf. Misztal, *Theories of Social Remembering*, 51.

constitute the acknowledged, social framework in which individuals recognize themselves as belonging to the community.

The bond between memory and identity is reciprocal. Collective identity – in the sense of shared values, interests, and aspirations of a society – provides the filters through which a collective sense of the past is created. At the same time, these shared images of the past reinforce the social solidarity, moulding the collective identity of the nation into a common narrative.⁵⁸ To the multiplicity of collective memories that emerge from the different social groups within a nation, a shared representation of the past at the national level provides the continuity to ensure the stability and identity of the nation. Rituals, monuments, commemorations, and symbols celebrating the past create a *continuum* in time that “serve[s] to convey the identity of the nation over time”.⁵⁹ The shared national narrative constitutes the backdrop against which the different memory-carrying groups will recount their own narratives, drawing support from it when they are compatible, or challenging it when they tell conflicting stories.

This intrinsic, reciprocal connection between memory and national identity is central to the establishment and maintenance of political leaderships within nation-states. It is not surprising, in fact, that politics of memory proliferate when nation-states find themselves in need of boosting their legitimacy. Not by coincidence, the first ‘memory boom’ experienced by the nation-states, as Olick notes, was in the late nineteenth century, when the social legitimacy of European states’ political authorities suffered as a consequence of what Nora calls “an acceleration of history”.⁶⁰ In that period, which challenged traditional political systems, political leaders rushed to build imposing monuments to tell the story of the heroic past of the nations, and archives and museums became crucial in the process of identity-construction.⁶¹ In this respect, Hobsbawm noted how the dramatic transformation of social groups and the relationships between them urged the nation-states to resort to use the past to

⁵⁸ Misztal, *Theories of Social Remembering*, 52.

⁵⁹ Closa, C., “Dealing With The Past: Memory And European Integration”, *Jean Monnet Working Paper 01/11*, (The Jean Monnet Working Paper Series, NYU School of Law - New York: 2011), 21, available at: <http://www.jeanmonnetprogram.org/papers/11/110101.html>.

⁶⁰ Nora, P., “Between memory and history: Les lieux de mémoire”. See also Matsuda, M., *The Memory of the Modern*, (New York: Oxford University Press, 1996), 54. On the interrelation between collective memory and nation-states see also Olick, J., “Introduction”, in *The Collective Memory Reader*, ed. Olick, 13–16.

⁶¹ On this aspect, in relation to post-war nationalisms, see also Winter, J., *Sites of Memory, sites of Mourning: The Great War in European Cultural History*. (Cambridge: Cambridge University Press, 1995).

create symbols of unity and cohesion.⁶² The overproduction of monuments, symbols, and history books represented the response of the political establishment to the nation-state's insecurities.⁶³

Coherently, the correlation between memory and identity has been used to explain also the contemporary "memory boom".⁶⁴ Scholars argue that, similarly to what had happened in the late nineteenth century, the crisis of the welfare state and that of the post-war progress induced a restructuring of national identities and collective aspirations. As a consequence, nation-states have again turned to the past to strengthen their unstable legitimacy.⁶⁵ These arguments may also apply to the case of societies and governments in the aftermath of institutional and social collapse. In those situations, the interrelation between memory and identity proves to be crucial for the reconstruction of the social and political fabric, and the endeavours of giving meaning to the recent past contribute to shaping the future figure of the new society. Because of the relevance thereof for the thesis, this will be elaborated further below.

1.4 The Presentist Approach

So far, by means of the analysis of Halbwachs' work and his legacy, we have been able to identify some of the "differentiating markers" – as Cubitt calls them – of the concept of collective memory that are important for the thesis. Collective memory is a social phenomenon which involves individual agency, diverse in nature, and deeply intertwined with the concept of group identity at different levels. Being a social process, moreover, collective memory can be constructed and reconstructed. From the latter feature, Halbwachs and his

⁶² Hobsbawm, E. J. and Ranger, T., eds. *The Invention of Tradition*. (Cambridge: Cambridge University Press 1983), 262.

⁶³ Misztal, *Theories of Social Remembering*, 59.

⁶⁴ Winter J., "The Generation of Memory: Reflections on the 'Memory Boom'", *Contemporary Historical Studies, Archives & Social Studies: A Journal of Interdisciplinary Research* 1, no. 0 (March 2007): 363 – 397.

⁶⁵ Olick, J. "Introduction", *The Collective Memory Reader*, ed. Olick, 3, 14. See also Nora, P. *Les Lieux de Memoire*, XIV ff. For an analysis of different understandings of the memory-nation relations, see Olick and Robbin, "Social memory studies", 116-117; 120-121. Illuminated sociologists and historians, however, complicate the "memory boom" phenomenon, claiming that its origins result from a multiplicity of "social, cultural, medical, and economic trends and developments". National power-legitimation policies of memory and identity are only one of the different sources that explain the "contemporary obsession with memory". Winter, J. "The Generation of Memory", 369-375.

followers derived another observation, which quickly came to attract the attention of sociologists. They argued that the process of construction and reconstruction of the past does not occur in a vacuum, but is directly connected to the present.⁶⁶ Going even further, Halbwachs contents that the process of reframing the past not only *happens* in the present, but is also *driven by* the present.⁶⁷ More precisely, in his view the representation of past events is filtered and moulded according to the present interests and capacities of the society. Current aspirations, principles, ideals, and material needs determine how communities read and remember the past. They determine, even more, *what* the past *is* for the present.

This theory, which is known as the “presentist approach”,⁶⁸ strengthens and enriches the image of memory as the boat connecting not only the present to the past, but also the past to the present. Taken to extremes, admittedly, it can lean towards a strong determinism that should be opposed.⁶⁹ Nevertheless, I believe this approach provides important insights for our notion. From the presentist approach, we learn, on the one hand, that collective memory is not only selective, but also selected, and, on the other hand, that collective memory always evolves and is negotiated according to the concrete interests of a given group in a specific historical moment.⁷⁰ The presentist approach highlights the instrumental character of collective memory, and explains its proximity to power-games and political dynamics. As

⁶⁶ Lessa, *Memory and Transitional Justice*, 18. Hutton, P., H., “Collective Memory and Collective Mentalities.” *Historical Reflections* 15, no. 2 (Summer 1988): 314.

⁶⁷ Halbwachs, *La topographie légendaire; On Collective Memory*, 25.

⁶⁸ Savelsberg J. And King, R. *American Memories. Atrocities and the Law*. (New York: Russel Sage Foundation, 2011), 10, 18. Misztal, *Theories of Social Remembering*, 55-61. The “presentist theory” is discussed and critically reviewed by Schwartz, B., “The Social Context Of Commemoration: A Study On Collective Memory”, *Social Forces* 61, no. 2 (December, 1982): 374-402.). For a critical analysis of the link between the past and the present, see also Olick, J. K., “From Usable Past to the Return of the Repressed” 9, no.2 *The Hedgehog Review* (Summer 2007): 19-31.

⁶⁹ Taken to the extreme, this approach leads Hobsbawm and his school of thought as far as to the invention of tradition theory. This theory was first put forth by Hobsbawm and Ranger (eds.) in the book *The Invention of Tradition*, and then developed by other authors. It claims that most of the traditions (intended as the “set of practices (...) of a ritual or symbolic nature”) are “invented” by the dominant elites, that is, they “seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past.” Hobsbawm, *ibid.*, 1. Images of the past, accordingly, are constructed on purpose, with the specific aim of transmitting a certain record of the past to legitimize the political power and authority of the dominant leadership. See also Anderson, B. *Imagined communities: reflections on the origin and spread of nationalism* (London: Verso, 1983).

⁷⁰ See, for instance, Schudson, M., “The Past in the Present versus the Present in the Past.” *Communication II* (1989): 105-113, included in the volume *The Collective Memory Reader*, ed. Olick, 287. His argument, though, admits that social organizations and nations are not fully free in “mak[ing] their own pasts” according to their present interests. According to Schudson, three factors limit the freedom to reconstruct the past, namely the structure of individual choices, the structure of available past, and the conflicts about the past.

noted, the fluidity of memory and its strong connection with identity make it an excellent mechanism to serve the political needs for power legitimation and the quest for social unification. Indeed, while politics of memory are not necessarily manipulative instruments for ideological strategies, looking at the history of past internal conflicts, we easily recognize examples of memory narratives' manipulation for political ends.

In the history of ex-Yugoslavia and its fall, for instance, more than once, politics of memory played a crucial role. They were used to force and alter the dynamics of power and governance within the country, feeding tensions between the groups and legitimizing violence. Tito's regime used the memory of the Second World War as a political strategy to create a common identity for the peoples of Yugoslavia, based on the narratives of their common fight against fascisms and for freedom. The leading political strategy that was deployed in that period systematically worked to greatly de-ethnicize the memories of the war in the official account of the history.⁷¹ The whole idea of a civil war, involving conflicting ethnic groups, was expunged from the official memory of the nation. Instead, narratives of the "national liberation war" and the "socialist revolution" were imposed.⁷² These stories recounted a glorious past in which the different groups of the nation were fighting together to free the Yugoslav people from the fascist domination. While these narratives selected the history of WWII to serve Tito's nationalistic ideology of "brotherhood and unity", competing unofficial memories – both individual and collective – were systematically silenced and neglected.

After Tito's death, in the eighties and nineties, politics of memory were again deployed to offset the past narratives that had served the socialist ideology. Where an artificial unitary memory had previously been constructed to promote the unitary state with its unitary history, conflicting and divisive memories came to the surface, being spoken out loud, exacerbating national division and reciprocal hate between groups. The seeds of this historical and political turnabout had already been planted in the domination over the past that was imposed during the socialist regime. According to Hoepken, "the fragmented and selective memory, with all its hidden and ignored stories, left niches for 'subversive' memories, which, under the

⁷¹ Hoepken, W., "War, Memory and Education in a Fragmented society: The Case of Yugoslavia". *East European Politics and Societies* 13, no. 1 (1999): 190-227.

⁷² Ibid., 201.

circumstances of political disintegration and economic and social crisis, were vulnerable to manipulation”.⁷³ And indeed, these “subversive memories” were soon exploited to frame the new national identities, and to intensify ethnic confrontation. Thus, for the Serbs, when Milošević rose to power, an official narrative of victimization and persecution was promoted within the society to justify the call to arms against the people who allegedly had inflicted suffering on the Serbian people. Following this logic, historical events – such as the Jasenovac atrocities –⁷⁴ were powerfully, and systematically portrayed and taught as symbols of the genocidal suffering to which Serbs had been submitted. These events were then invoked to legitimate the violence against the “others”.

Similarly, memory manipulation was employed for the re-elaboration of the new Croatian identity. There, symbols of oppression were emphasized and hyped to oppose the Serbian ones. An *ad hoc* selection of narratives was included as part of the political strategy to tailor the image of the new Croatian nation-state. The Croatian patchworks of memories had different sources, which revolved around the image of a dominant, suppressive Serbia. This image dated all the way back to the first Yugoslavia (1918-1941), and was a particularly powerful narrative for the construction of Croatian identity, based on victimhood. The dominant narratives mostly focused on the end of the WWII hostilities, and on the partisan massacres of the Croatian population. At the same time, narratives of the massacres committed by Serbian Chetniks played an important role in evoking this picture of victimization as well.⁷⁵

On both sides, additional narratives of historical land rights and power legitimacy were also deployed to sustain the political strategies of the conflict. Instead of going through an inclusive reading of conflicting memories, the revision of the past after Tito ended, on both

⁷³ Ibid., 204.

⁷⁴ The history of the Croatian concentration camp of Jasenovac, in which hundreds of thousands of Serbs, Bosnians, Slovenians, Roma, Jews, and other political opponents to the Croatian Ustaša Party died during WWII, has been one of the contested symbols of victimizations on both sides. For an account of the history of this *lieu de memoire* and the memory-battles it has been spectator of, see Boban, L., “Notes and Comments: Jasenovac and the Manipulation of History”, *East European Politics & Societies* 4, no. 3 (September 1990): 580-592.

⁷⁵ Hajdinjak, M., “From Organized Oblivion to Forced Remembering: Memory and Identity among Serbs and Croats”, paper presented at the international symposium “The Memory of Violence/Genocide: Its Meaning in the Process of Peace Building,” 18 March 2006, University of Tokyo, Tokyo, available at: http://pdc.ceu.hu/archive/00003871/01/Memory_and_identity.pdf. On the battles of memories in Bosnia and the connections between memories of World War II and the twentieth century genocidal conflict, see also Miller, P. B. “Contested memories: the Bosnian genocide in Serb and Muslim minds”, *Journal of Genocide Research* 8, no. 3 (2006): 311-324.

sides, with a body-count exercise to establish who had been the worst perpetrators. This led to narratives of divisive nationalisms and opposing identities, which were functional for the purposes of political disintegration of the communist nation and destruction of the other ethnic groups. Memory, again, became a political, but sadly real battlefield.

However, the shaping of the past through the lens of present interests is not exclusively a trait of dictatorial regimes. Even in democratic and pluralistic systems, the public production of memory, especially when stemming from governmental institutions, provides a dominant version of history because of the authority of the institution from which it emanates. True, as Avishai Margalit warns, democratic regimes should anchor their legitimacy “not in the remote past, but in current elections”. For a democratic society, he writes, mourning the past is like “crying over spilt milk”.⁷⁶ Nevertheless, the presentist approach suggests that, even in these systems, the elaboration of the past is not merely a futile mourning split milk, but a political strategy for current goals. The deep connections between power-politics and memory-politics hence cannot be neglected in either of these systems. That is not to say that democratic systems have a hegemonic control over memory-production. Even official memory (originating from governmental acts and institutions) should be (and in fact in democratic systems usually is) open to contestation and debate within the society. All the same, even liberal democracies need to create a shared background to bring together citizens, around the same foundational values and principles. Mastering the past is a way to achieve this purpose.

Perhaps the clearest example of the political use of memory in a democratic system is France and its *politiques mémorielles*. There, the image of the democratic, human-right-respectful, republican France has been strongly reinforced and supported by the careful management of past narratives, and their circulation over time. The representation of history has often been adjusted by political leaders better to correspond with this image. Different approaches to the most painful dark pages in French history may be read in the light of the political needs of the nation in that specific time. For instance, the ways in which the narratives of Vichy and the Algerian war have been managed by the political leaders provide examples of these manipulative policies over the past. These narratives were clearly at odds with the French republican national identity. Vichy represented the shamefully involvement of

⁷⁶ Margalit, *The Ethics of Memory*, 11-12.

France in the genocidal Nazi plan. The Algerian war carried stories of systematic torture committed by French soldiers. For a long time, therefore, the dominant interpretation of those periods tried to cover up this incoherence.⁷⁷

As for Vichy, in the aftermath of the Second World War, the Gaullist story told the consoling myth of the strong opposition of the whole nation united against the Nazi regime.⁷⁸ The French collaboration with, and participation in the Holocaust were archived as an exceptional interlude, carried out by foreigners, and the Gaullist *ordonnance sur rétablissement de la légalité républicaine* declared the Vichy regime, together with all its acts, null and void.⁷⁹ Similarly, the official story about the Algerian war disregarded the systematic use of torture by French soldiers, disseminating the traditional narrative of “exception”. Acts of torture, which were undeniably committed, were said to only have taken place as isolated incidents perpetrated by a few desperate soldiers, determined by the circumstances of a gory war.⁸⁰ In both cases, a sophisticated and complex array of memory policies and laws were adopted to support these narratives. These measures eventually contributed to the construction of collective memories that matched the official representation of the nation. Hence, the instrumental use of collective memory proved to be just a different means of policy-making.⁸¹

⁷⁷ On the memory of Vichy see Löytömäki, S., “Committing the irreparable: Law and dealing with past injustice.” (Ph.D. thesis, European University Institute, 2010); on the memory of the Algerian War in France see, by the same author, “The Law and Collective Memory of Colonialism: France and the Case of ‘Belated’ Transitional Justice”, *The International Journal of Transitional Justice* 7, no. 2, (2013): 1–19.

⁷⁸ Osiel, *Mass Atrocity, Collective Memory and the Law*, 101-102, 159-160; Löytömäki, “Committing the irreparable”, 58 – 62.

⁷⁹ *Ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine*. Article 1 denied the very same experience of the Vichy regime, by stating that “[l]a forme du gouvernement de la France est et demeure la République. En droit celle-ci n'a pas cessé d'exister.” As a consequence, Art. 2 declared “nuls et de nul effet tous les actes constitutionnels législatifs ou réglementaires, ainsi que les arrêtés pris pour leur exécution, sous quelque dénomination que ce soit, promulgués sur le territoire continental postérieurement au 16 juin 1940 et jusqu'au rétablissement du Gouvernement provisoire de la République française.” Available at <http://www.legifrance.gouv.fr>. On this, see Fraser, D., “Law, Lawyers and the Holocaust: The Case Against Vichy France” *Holocaust Genocide Studies* 12, no. 1 (1998): 139-141; and, incidentally, Löytömäki, “Committing the irreparable”, 59.

⁸⁰ For an analysis of the memory policies regarding to the French collaboration with the Nazis and its involvement in the Holocaust, see also, Rousso, H., *The Vichy Syndrome: History and Memory in France since 1944*, trans. Goldhammer, A. (Cambridge: Harvard University Press, 1991). In relation to the memories of the French colonial past, see, for instance, Bertrand, R., *Mémoires d'empire: La controverse autour du 'fait colonial'* (Bellecombe-en-Bauges: Éditions du Croquant, 2006). In respect of the debate over the torture committed during the Algerian war see Rieff, D., “The Bureaucrat of Torture”, *World Policy Journal* 19, no. 1 (2002): 105-110; Löytömäki, “The Law and Collective Memory of Colonialism”; MacMaster, N., “The torture controversy (1998-2002): Towards a 'new history' of the Algerian war?” *Modern & Contemporary France* 10, no 4 (2002): 449-459.

⁸¹ In Puggiotto's words: “La memoria collettiva, dunque, non è un dato bensì «una posta in gioco» ed il suo uso strumentale altro non è che «una consapevole e programmatica prosecuzione della politica con altri

The presentist approach, thus, is relevant for our analysis in that it stresses how current political interests and values can inform the records of the past. It should be noted, however, that most of the ‘presentist memory studies’ take a state-centric perspective, and focus on the relation between memory-management and national power. They therefore scrutinize the manner in which the political authorities in power, as in the former Yugoslavia and the French cases, master remembering and forgetting in order to select and give meaning to memories – be it consciously or unconsciously – with a view to present an account of the past which best fits their own political agenda.

However, following the progressive erosion of the power of nation-states and the rise of new forces which impact on social dynamics, the (conscious or unconscious) management - or manipulation - of the past is increasingly controlled by new agents and driven by new interests. Market economy, independent media, and international institutions nowadays concurrently produce different representations of the past, according to their own perspectives, which may well compete with the official one(s). It is my argument that the human rights discourse, as an external force carrying modern values and principles, influences the process of reconstruction of identity for societies emerging from deep institutional and social crisis. It does so, I argue, also by influencing the way states, involved in patterns of serious human rights violations, manage information about their past. By entering into fields which traditionally have been used by governments to select their own collective memories, it seems that human rights norms play the role of that agent of interests, in managing collective memory, which Hobsbawm and Ranger first associated with the state.⁸² Human rights law and international law are the instruments to perform that task. Before further developing this thought about the role of international law in shaping collective memories, it is useful to explore the relation between memory and law.

mezzi». Pugiotto, A., “Quando (e perché) la memoria si fa legge” - quoting Isnenghi - *Quaderni costituzionali* 1, (2009): 21.

⁸² That is not to say that International Law is taking over the role of the state in shaping national memory, but rather that – I believe - International Law is somehow limiting that state’s power to manipulate or select the social perception of the past.

2. Interdisciplinarity of Memory

2.1 Memory and Law

The thorny relationship between memory and law is an ever-existing issue. In 403 b.c., after the ‘Thirty Tyrants’ regime, Athenians Democrats took the oath to *me mnesikakein* – not to remember past wrongs. They adopted an amnesty decree, which not only waived the prosecution of perpetrators for the crimes committed during the *stasis*, but also prohibited the public remembrance of those atrocities.⁸³ Already in that era, this decision ignited vehement protests that considered such a law contrary to both divine and human laws. In more recent epochs, blurring the distinction between memory and history, this relation has been often explored under the label of the *history-juridification* process. The legal regulation of the connection between past and present within a society poses a number of theoretical and philosophical concerns and hurdles that are common to every process in which human and social activities are to be regulated by legal norms. The debate on this subject encompasses different phenomena, ranging from the role of the legislator in encapsulating principles, theories, and methodologies of the scholarly historical research in legal canons to the participation of historians in jurisdictional processes aimed at *judging* history; from the possibility (and capability) of the law to do *historical justice*, i.e. repairing past wrongs, to the influence of memory-carrying groups in the decision-making processes and its outcomes. It touches upon different legal principles and values – freedom of speech; criminal law canons, such as *nullum poena sine lege*; minority rights; and democratic rules.⁸⁴

Recently, with the rise of the transitional justice field, the attention to memory in legal research – especially in the branches of human rights and international law – has primarily and mostly been devoted to the ways societies reckon with past violence and past atrocities. That is also the angle of this research. This work’s main focus has been the relation between memory-

⁸³ However, the decree did not apply to the 30 tyrants’ closest henchmen, who were executed. The literature reporting on these events is exhaustive. On the Thirty Tyrants regime, the transition to democracy, and the amnesty, see, among others, Wolpert, A., *Remembering Defeat. Civil War and Civic Memory in Ancient Athens* (Baltimore and London: The Johns Hopkins University Press, 2002). An analysis of this story as a case study of transitional justice is provided by Lanni, A., “Transitional Justice in Ancient Athens: A Case Study”, *University of Pennsylvania Journal of International Law* 32, no 2 (2010): 551-594. For a poignant actualization of this story to the Italian history in the aftermath of “Gli Anni di Piombo”, see Agamben, G. “Cattive memorie”. *Il Manifesto*. Rome, December 23, 1997.

⁸⁴ For an overview of the different phenomena and debates encompassed in the concept of “giuridificazione della storia” (‘juridification’ of history), see Zeno-Zencovic and Resta, “La Storia ‘Giuridificata’”.

process and legal institutions. Marc Osiel, in *Mass Atrocity, Collective Memory and the Law*, highlights the complexities entailed in the law influencing the collective memory of a nation. He analyses how the law (in particular through criminal trials) can be used, either to shape specific understandings of the national history – constructed from shared values and consensus –, or, on the contrary, to offer an arena of “civil dissensus”, in which individuals and groups hear and acknowledge each other’s voices. He argues that, in this storytelling function, the law can become an instrument to foster social solidarity in the aftermath of administrative massacres.⁸⁵ Following the same path, Savelsberg and King note the role of trials – as writers of history and archives of historical records – in motivating and shaping “whether and how states respond to intergroup violence and atrocities”.⁸⁶ Martha Minow considers the mediating role of memory in “breaking the cycles of violence” through legal institutions. She recognizes the numerous functions legal institutions can have in conveying different voices, collecting narratives and stories, and allowing victims to deposit their memories.⁸⁷ Similarly, Susan Karstedt understands legal institutions as “enabling structures”. She argues that, because legal institution can be used to relay different memories and narratives to the same forum, they can facilitate a discussion on the meanings of the past, and thereby contribute to the shaping of new collective memories.⁸⁸ Alexander further constructs legal frameworks as institutional arenas for what he calls the “representational process” - that is the social process of assigning meanings -, which stretches from a traumatic event to its representation within the collective. He notes that, in legal institutions, all the questions that mark the process of collective representation of past trauma – what happened; who was affected; how the society relates to the victims; who are the perpetrators/responsible – coexist and interact. Law, accordingly, is a theatre in which the different voices from the past interact to master new narratives of social

⁸⁵ Osiel, *Mass Atrocity, Collective Memory and the Law*, 6-23.

⁸⁶ Savelsberg and King, *American Memories*, 15.

⁸⁷ Minow, M., “Memory and Hate: Are There Lessons from Around the World?” in *Breaking the cycles of hatred: memory, law, and repair* (Princeton: Princeton University Press, 2002), 14-31.

⁸⁸ Karstedt, S., *Legal Institutions and Collective Memory* (Oxford; Portland: Hart, 2009), 5; “Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice”. *Law & Policy* 20, no. 1 (1998): 15–56.

suffering.⁸⁹ This literature provides the basis upon which I build, and according to which I develop the argument of the thesis.⁹⁰

As we have seen so far, the main characteristic of memory, in general, and that of collective memory, in particular, is that memory is fluid, in motion, sensitive to change over time, and *by* the passing of time and generations. That is why, when it comes to dealing with the elusive concept of memory, the law struggles. Every law student would agree that law is about certainty and determination, about lawful and unlawful. Memory is a conversation within the time between present and past, is about individual and social identity, about relationships and emotions, about experiences, about life. As such, like every time the law is to regulate profoundly human dynamics, tension arises between the language and instruments of law and the social language and dynamics. Yet, there is much the law can do about memory.⁹¹ Its impact on the memory-making process is evident when one considers the main means through which memories are forged. Since the usual tools to accomplish the selective memory-work and production are memorials, official rituals and commemorations, public archives and monuments, but also public education systems and public media, law clearly has a direct or indirect influence on regulating each of them.

Law is the instrument to secure the reciprocal bond between power and memory, both in liberal and authoritarian systems. Through legal institutions and legal constraints, intentionally or unintentionally, political leaders can master the past with the seal of the law, and make this mastering objective and legitimated.⁹² In the above mentioned French case, for instance, the law was the main means used by the government to conceal the colonial experience. The passing of amnesty laws and the strategic adoption of a restrictive legal definition of crimes against humanity allowed the nation to preserve the exceptional ideal of

⁸⁹ Alexander, J., "Toward a Cultural Theory of Trauma" in *Cultural Trauma and Collective Identity*, ed. Alexander, J. (Berkeley: University of California Press, 2004): 10-17, discussed in Savelsberg and King, *American Memories*, 25.

⁹⁰ A new socio-legal study on the reciprocal interaction between law and collective memory is expected in 2015, with the publication of the work by Hirsh, M., *The Sociology of International Law* (OUP, *forthcoming*). The book will include a chapter on "Collective Memory and International Law". A preliminary reflection on this topic, together with the announcement of the forthcoming publication, was put forth by Hirsh in "Collective Memory and International Law", *ESIL Reflections* 3 No. 7, 17 September 2014, available at: <http://www.esil-sedi.eu/>.

⁹¹ Osiel, *Mass Atrocity, Collective Memory and the Law*, 215. Osiel is however sceptical about the possibility of intentionally constructing collective memories through legal blueprints. *Ibid.*, 209-239.

⁹² For a discussion and critique on the need for independence of the law from politics, see Koskenniemi, M., "The Politics of International Law." *European Journal of International Law* 1 (1990): 4-32.

unity and republicanism, downplaying its responsibility for serious human rights violations.⁹³ At the same time, however, law can also stimulate a critical reflection on the past, conveying conflicting voices in the same theatre, and letting them talk to each other in a democratic play of reciprocal listening. Returning again to the French example, the historical trials of Barbie, first, and those of Touvier and Papon later, opened *fora* for discussion about the silenced and painful memories of Vichy.⁹⁴ This opening, in turn, paved the way for the formal recognition by the French government of (and their apology for) France's responsibility for its complicity in the Nazis' atrocities.⁹⁵

In practical terms, the main contributions of the law to the memory-making processes are two-fold. As Savelsberg and King pointedly maintain, on the one hand, the law explicitly produces specific understandings of past events through the ritual power of trials and courts (*faire l'histoire*). On the other hand, the law regulates data and information about past events by legislating on production, and access to, and distribution of information (*maîtriser l'histoire*).⁹⁶ Law, therefore, is at the same time a filter through which the past is read and interpreted, and an instrument through which specific narratives of the past are selected and divulged. Through the law, governments may acknowledge the abuses committed in the past. Through the law, victims of past injustices can receive redress by (economic and symbolic) recognition. Through the law, marginalized memories can find a place to speak their stories aloud, addressing the society. Through the law, open, critical revision of the past can be fostered. Yet, through the law, access to information about the past can be restricted or even denied, historical events can be distorted and manipulated with public authority, and past injustices can receive a pseudo-historical justification for their having been commissioned in public *fora*. As such, the double-sided sword of law can be either an invaluable tool to

⁹³ Löytömäki, "The Law and Collective Memory of Colonialism", 17-18.

⁹⁴ Löytömäki, "*Committing the irreparable*", 62-90.

⁹⁵ On 16th July 1995, speaking at the commemoration ceremony of the 53rd anniversary of the Vel d' Hiv roundup (the mass arrest made, on 16th and 17th July 1942, by the French police in Paris of about 13,000 Jews who were afterwards detained, under horrible conditions, in the big indoor stadium "Vélodrome d' Hiver", before being shipped to the extermination camps), President Jacques Chirac publicly recognized the French responsibility for those events. He said: "France, the homeland of the Enlightenment and of the rights of man, a land of welcome and asylum, on that day committed the irreparable" quoted in and trans. by Simons, M., "Chirac Affirms France's Guilt In Fate of Jews", *The New York Times* (17 July 1995).

⁹⁶ Savelsberg and King, "Law and Collective Memory", 190. On the different layers of interaction between law and memory, see also Resta, and Zeno-Zencovich, "La storia 'giuridificata'", 11- 41.

promote a frank and honest dialogue on a thorny past, or a rigid instrument to expropriate the memory-negotiation process from society and to cast it into the legal realm.⁹⁷

Expanding the analysis on the connections between law and memory, in an era of supra-national forces, this relation can be further elaborated and complicated through the analysis of the increasing role of international frameworks and structures in the processes of making memory. I argued above that international law – as a tool for the human rights discourse – may play the role of agent of interest which carries present interests that shape collective memories.⁹⁸ More precisely, the argument I put forth in this thesis is that international law imposes certain behaviours on states that influence the way societies end up recollecting, commemorating, or forgetting past events which constituted gross violations of human rights.

It does so in two ways. First, directly, through international institutions, when it requires states to adopt memorialization initiatives to commemorate specific events, or when they explicitly provide historical accounts of the past. This is the case, for instance, in the remedial orders that some human rights bodies have issued as a means of reparation owed to victims of severe abuses.⁹⁹ In this first category, there are also included decisions of international courts that purport specific interpretations of the past, such as international criminal tribunals. These narratives, flowing in from the international level to the local one through the work of media and other communication *vectors*, enter into the local discourse on memory within the society. Second, it does so indirectly, by requiring states to comply with certain obligations that pushes them to face their past, and to do so with specific means. Existing primary and secondary state obligations, such as the obligation to investigate, to provide reparations, and to allow access to information - which will be discussed in more detail in the thesis - indirectly impact on the processes of memory-making. To comply with these obligations, states are compelled to dig into their past and to disseminate information about it, with evident effects on the processes of memory at the social and official level.

The way international law affects the processes of memory within a society, moreover, is twofold also from another viewpoint. Not only does it impact on the way states understand

⁹⁷ Löytömäki, S., *Law And The Politics Of Memory. Confronting The Past* (New York: Routledge, 2014).

⁹⁸ This view seems to be shared also by Hirsch, “Collective Memory and International Law”.

⁹⁹ *Infra*, Ch. V.

their past both directly and indirectly, but it also does so on two levels, namely both at the official level and at the social one. On the one hand, when international law leads governments to adopt a specific understanding of the past, it impacts upon the manner in which local institutions publicly recognize the past. On the other hand, when international law indirectly introduces memory narratives within a society, its effects reflect also on the social processes of memory.¹⁰⁰ When talking about the impact of the law on the memory-making processes, one may therefore look both at the official, public memory of a state, and at the collective memory of the society within that state. Since this thesis only deals with the international legal framework of dealing with the past, its primary concern rests with the impact of international norms on states' conducts, and only incidentally on the way this may affect the social processes of negotiating memories. In the course of this thesis, I will generally refer to these two forms of memory, using the term *collective memory* when indicating the social process of making sense of the past within a community, and the term *official memory* (or public memory) when talking about narratives of past events that are officially acknowledged and supported as true by national institutions. Both of them, however, are observed from the point of view of states' behaviours. The first is intended as something fluid, in the making, negotiable, and adaptable. The second, on the contrary, is more static - although not fixed - but slow to change -, as institutions are slow in making changes. In the context of countries emerging from authoritarian regimes or from mass violence, in transition to democracy, these two forms of memory can easily be in contrast. While human rights principles and the rule of law push for domestic institutions to quickly tell a story that puts an end to the controversy and condemns past violence, the society needs time to understand, compare and confront, negotiating the individual experiences and narratives. The memory-processes in these contexts reflect the distinctive features of the situations in which they take place. Before moving on to explore the ways international law influences states' conducts with regard to memory processes, it is important to reflect upon the peculiarities of the transitional justice discourse.

¹⁰⁰ The distinction between direct and indirect effects and official and social memory, however, is not symmetric. Indeed, it may well be that international law provisions or decisions which directly impact on official memory produce effects also for the social processes of memory. Indeed, this is most frequently the case.

2.2 Memory and Transitional Justice

The *Encyclopedia of Genocide and Crimes Against Humanity* defines transitional justice as the field of research and practice that focuses on how societies address the legacies of past human rights abuses, and other forms of grave social trauma, in order to wend their way towards a “democratic, just and peaceful future”.¹⁰¹ The field has developed since the mid-80s, in conjunction with the re-democratization processes in Latin America. It draws upon the understanding that peace, justice, and reconciliation cannot be achieved in war-torn societies without an open confrontation with the legacy of past violence. As a consequence, the issues of accountability, truth, victims’ rights and institutional reforms have led the way for studying and developing best practices and guidelines for societies to deal with their past.

As understood by the 2004 UN Secretary General report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, transitional justice includes the full range of legal, political, and social processes and mechanisms that are put in place to allow a democratic transition toward accountability, justice, and reconciliation.¹⁰² While the legal and political approach of human rights and political science originally informed the growth of the field, a wide range of disciplines was subsequently involved in enriching the study of this subject with different approaches.¹⁰³ Today, the transitional justice discipline provides a holistic framework that encompasses judicial and non-judicial means, both institutional and non-institutional, which attempt to build a bridge for the transition between a violent past and the future, developing a backward/forward-looking model.¹⁰⁴

In dealing with large-scale human rights abuses and their aftermath, studies in the field of transitional justice have constantly underscored two main aspects, which I see as great contributions to the international and local efforts of social and institutional reconstruction in

¹⁰¹ Bickford, L., “Transitional Justice” in *Encyclopedia of Genocide and Crimes Against Humanity*, ed. Shelton, D., (Detroit: Macmillan Reference USA, 2004), vol. 3, 1045-1047.

¹⁰² UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, 23 August 2004, S/2004/616, available at: <http://www.refworld.org/docid/45069c434.html>, 4, available at <http://www.unrol.org/files/2004%20report.pdf>.

¹⁰³ Bell, C., “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’”, *International Journal of Transitional Justice* 3, no.1 (2009): 5. See also Méndez, J.E., “Editorial Note”, *The International Journal of Transitional Justice* 3, no. 2 (2009): 157–162.

¹⁰⁴ The distinction between backward-looking and forward-looking transitional justice mechanisms is quite common among scholars working in the field. Clause Offe, in particular, uses it for constructing a taxonomy of mechanisms. Offe, C. *Varieties of Transition. The East European and East German Experience*. (Cambridge: Cambridge Polity Press, 1996).

violence-torn societies. Firstly, transitional justice discourse has advanced the growing consensus at the international level that wide patterns of serious human rights abuses cannot remain unaddressed. Mass atrocities cannot be silenced and forgotten. Victims' quest for truth and justice must be answered. Societies have to face their violent past by adopting comprehensive, multifaceted strategies. This has now become a solid argument within the international community, which resists cover-up initiatives and blanket amnesties at the local level.

Secondly, transitional justice has rejected the 'one-size-fits-all formula' as inconsistent with the bottom-up approach, which it has suggested to enhance the ownership of societies over the reconstruction processes. The main understanding is that each society and each situation have their own specificities that are to be taken into account. While indicating minimum standards and general guidelines, transitional justice calls for an active participation of each community in its transitional process. At both the institutional and social level, the choice about which the transitional justice mechanism to adopt in each specific case is contingent on the local systems of decision-making. Understanding transition as complex, multidimensional, fluid processes means accepting a variety of answers to the (apparently) same question. Espousing this idea, transitional justice attempts to strike the balance between local needs and international concerns. It does so by suggesting a whole set of intertwined mechanisms that, as in a complicated recipe, should be accurately dosed and mixed according to the local flavour.

Having briefly looked at what transitional justice is, and having highlighted some important aspects that will prove relevant to our discussion, let me clarify what the relevance of transitional justice is in the discourse on memory. This thesis addresses transitional justice by looking at the dynamics of memory – to the extent that they are influenced by international law obligations – in societies which are moving from patterns of systematic and extensive human rights violations to democratic systems respectful of human rights. That is, transitional justice provides the context within which the relationship between international law and memory processes will be explored. Transitional justice, consequently, delimits the scope of the examination by delineating the set of legal obligations that will be analysed as being relevant in the course of this study.

But transitional justice does not just delimit the scope of the thesis. It also adds additional aspects to the complex process of memory-making which is under consideration. I believe the peculiarities of the societies that undertake processes of democratic transition also influence the social and political mechanisms of memory-construction. Memory processes in transitional justice contexts have different dynamics, and follow different patterns. In those situations, the experience of past suffering has temporal-proximity to the present. Perpetrators and victims – or at least their next of kin – are often still alive, and they struggle, together with the whole society, to make sense of what they experienced. Their memories are voiced simultaneously with official narratives, to which they sometimes oppose, and the quest for truth and memory may well be at odds with other compelling needs of stability and reconstruction. Although the thesis does not deal with the sociological work of unfolding these dynamics, it is important to take into account these peculiarities in order to understand, firstly, the very concept and features of the kind of memory(/ies) that is/are investigated here, and, secondly, the relevance of any external modification of the memory-making process in the dynamics of democratic transitions. The relations between memory and transitional justice are therefore worth exploring in this chapter.

Commemorations and memorialization projects are included in the comprehensive transitional justice programs. Together with prosecution, truth-telling, reparations, and guarantees of non-repetition, memory – in the form of memorialization –¹⁰⁵ is considered one of the pillars of the holistic transitional justice strategy. Previous researches on transitional justice have regarded the memory of the violence mainly as a source of (moral and practical) lessons from the past, to be cautiously preserved as a guarantee against the repetition of previous mistakes.¹⁰⁶ At the same time, though, some of these studies have also acknowledged the potential danger that the political use of memory and memory-related

¹⁰⁵ Here, I use the term ‘memorialization’ to indicate the broad set of tangible and intangible symbolic artefacts directed to commemorating and remembering past events – such as monuments, museums, initiatives and rites –, which in transitional justice contexts relate to past traumas.

¹⁰⁶ See, for instance, the recent work of Bickford, L., and Sodaro, A., “Remembering Yesterday to Protect Tomorrow: The Internalization of a New Commemorative Paradigm”, in *Memory and the Future: Transnational Politics, Ethics and Society*, eds. Gutman, Y., Brown, A., and Sodaro, A. (New York: Palgrave MacMillan, 2010), 66-89. Bickford already pointed out the role of memorializations as part of the “transitional justice tool-kit” in “Transitional Justice” in *Encyclopedia of Genocide and Crimes Against Humanity*, 1047.

initiatives may pose to the endeavours for peace and stability within societies in the aftermath of violence.¹⁰⁷

Nevertheless, compared to the other pillars, memory has been largely ignored by the studies on transitional justice – or, at least, it has received only limited attention.¹⁰⁸ While warning about the importance of memorialization in post-conflict and post-violence societies – for better or worse –, the literature has mainly focused on assessing the contribution of memorials to reconstruction processes and on elaborating guidelines and best practices for them.¹⁰⁹ Although, admittedly, this analysis is an important part of understanding and supporting democratic transitions, what the transitional justice literature on memory has often left underexplored, I think, is the role of the other transitional justice institutions on recollecting and making sense of the past, and its consequences on collective memory of the society. The transitional justice scholarship has focused on the processes of collecting, elaborating, and giving meanings to historical records for creating memorials. It has however been rather hesitant to assess the effects on collective memory of these parallel processes when they were established, for instance, within the hearings of criminal tribunals and truth commissions.¹¹⁰ As a consequence, it has partially failed to seriously, comprehensively question the impact of the whole transitional justice framework on the processes of historical interpretation of the past and memory-making within a society.

¹⁰⁷ Rosalinda Shaw, for instance, tell us about the frictions between memory and forgetting as instruments of reconciliation in the background of the establishment of the Sierra Leone Truth Commission. Shaw, R., “Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone”, *The International Journal of Transitional Justice* 1, no.2 (2007): 183–207.

¹⁰⁸ Rosoux, V., “Human rights and the ‘work of memory’ in international relations”, *Journal of Human Rights* 3, no. 2 (2004): 159-170, at 159.

¹⁰⁹ See, for instance, the work carried out by the ICTJ. J. Barsalou, B. and Baxter, V., “The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice”, (Washington, DC: United States Institute of Peace, 2007), available at: <http://www.usip.org/publications/the-urge-remember-the-role-of-memorials-in-social-reconstruction-and-transitional>. A critical analysis of the impact of memorial sites on transitional processes is offered in Hamber, B., Ševčenko, L., Naidu, E., “Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition.” *The International Journal of Transitional Justice* 4, no. 3 (2010): 397–420. See also Hamber, B. “Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 560-582; Hamber, B. *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health* (New York: Springer, 2009).

¹¹⁰ Nevertheless, some discussion on this relationship has been put forth. See, for instance, Bickford, L., “The Power of Memorials: Human Rights, Justice and the Struggle for Memory.” Paper presented at the ICTJ/JICA Conference, Cape Town, South Africa, 29 March 2005.

All the transitional justice components somehow provide accounts of what happened, either explicitly or implicitly. In effect, storytelling is an intrinsic part of the transitional process. Transitional justice is defined as a “process of negotiation between competing imagery that has many internal and external dimensions”, and its mechanisms can be seen as sources of that imagery.¹¹¹ Each of the transitional justice tools, to some extent, manages historical data and information, and eventually produces images of the past that need to be reconciled – or at least placed in relation – with the other vectors of memories. Images of victimhood and guilt, and narratives of suffering and abuses are composed and divulged through these mechanisms. This takes place sometimes in a dichotomy discourse on the past – typical of transitional justice –, other times producing more nuanced, kaleidoscopic understandings that enrich – and complicate – the representation of the past and the possibility of giving meanings to the past traumatic events. This ‘storytelling task’ is by definition intrinsic to the classical institutions entrusted with telling the story – truth telling bodies and jurisdictional courts –, which propose their own accounts of the past tailored to their procedures, mandate, competences and timeframes. Also the other transitional justice mechanisms, however, elaborate and convey specific messages on the past. For instance, reparation programs create categories of victims, and assess their suffering according to the political orientation that led to their adoption. In doing so, they implicitly endorse certain understandings of past events. Similarly, official apologies, educational programs, and public commemorations will promote either one or the other memory, while necessarily repressing the competing ones.

In addition to the previous considerations about the impact of transitional justice mechanisms on the memory-making processes, the inherent connection between collective memory and national identity, lying at the heart of the transitional justice discourse, should be also addressed. The moral and political question of how to deal with past violence, and how to reckon with its legacy is central to every society undertaking a national reconstruction process in the aftermath of traumatic events. Since the processes of democratic transition have often shaken the foundational values and the social dynamics which maintained the pattern of violence or conflict – and propose new ones –, the reading and interpretation of the past are essential steps on the path towards constructing new identities. In these contexts, as Avishai

¹¹¹ Brants, C., “Introduction”. In *Transitional Justice. Images and Memories*, eds. Brants, C., Hol, A., Siegel, D., (Farnham, Surrey: Ashgate, 2013), 5.

Margalit writes, “[c]ommunities must make decisions and establish institutions that foster forgetting as much as remembering.”¹¹² More so than in any other situation, in these scenarios of political instability and social fragmentation, memory plays the above-analysed role of political tool to legitimize or delegitimize institutions and powers and to shape social identity.

Especially in processes of transitional justice, memories of traumatic events have been used to foster social cohesion, and enhance the process of adapting and negotiating collective identity. In the Latin America context, for instance, the ‘*Nunca Mas* narrative’ dominated the whole process of political and social transition to democracy. It provided the bases on which to reconstruct the new social order and identity which primarily recognizes itself in opposition to what happened during the military dictatorships in the region. The representation of the atrocities of the past regimes in the public opinion proved to be a powerful instrument to mobilize the civil society, and to delegitimize the previous leaderships. Vehemently voicing the memories of violence that for a long time had been silenced, contributed to awakening the social conscience and moving on along the political and social way to the transition.

These two ties between transitional justice and memory – that is, on the one side, the storytelling role of transitional justice mechanisms and its impact on collective memory, and, on the other side, the interplay between identity narratives and the transitional justice process - reveals, I believe, the strong, reciprocal bond between them. If, on the one hand, the transitional justice ‘package’ that governments choose to implement in dealing with violent past contributes to forge new memory narratives through the storytelling role of transitional justice mechanisms, on the other hand, these narratives contribute to construct a new social identity, in which, in turn, those mechanisms find their legitimacy. The political choice to deal with the legacy of past abuses through – say - amnesty laws, compensations to victims, and reconciliation projects, rather than with prosecutions, vetting, and commemorations, certainly influences how a certain society will address and understand its past. At the same time, however, a pre-existing, social network of irreconcilable memories may determine political elites to reject political options that presuppose any open discussion on the past. Indeed, as Francesca Lessa notes, memory narratives emerging in the aftermath of mass violence, create “a sort of latent framework for making sense of the past”; in so doing, they may provide

¹¹² Margalit, *The Ethics of Memory*, 13.

widespread legitimacy to the political choices made at the institutional level regarding the transitional processes. In this way, eventually, they may both reinforce and gain authority from the institutional and social order which materializes as a consequence of the rupture with the past.¹¹³

Concluding remarks

This chapter posited the theoretical bases for the main argumentation of the thesis. It discussed the controversial notion of memory, to found a common understanding of it for the purpose of this research. In doing so, it first provided a general account of the main issues in, and approaches to memory-studies, and pinpointed some main features of the concept of memory. After that, the chapter analysed how the intersections between the processes of remembering in post-violence and post-conflict societies and disciplines such as law and transitional justice can furthermore affect the characteristics and dynamics of memory.

In particular, this chapter identified what have been called ‘differentiating markers’ of the concept of memory. The analysis started from the concept of collective memory and the critiques made of it. The interrelation between the social and individual dimension of memory came first to the fore. We learnt that collective memory is first and foremost a social process, constantly in flux and in evolution, emerging from the constant negotiations among different memory-carrying groups within the society, and between them and political institutions. I constructed the concept of collective memory not as a monolithic, shared, unitary image of past events, but rather as the complex, sometimes problematic coexistence of multiple narratives, which need to be acknowledged and included within the social processes of memorialization. Alongside this social dimension of collective memory, the role of individual agency in the memory-making process was then discussed and accommodated within the notion of collective memory. Although referring to a social phenomenon, the understanding of memory in this research in fact does not disregard the role played by individuals, in general, and victims, in particular, in the processes of coming to terms with past suffering and violence. The existence of collective, social narratives, hence, cannot frustrate the private memories of the individual.

Furthermore, I remarked on the crucial connection between collective memory and national identity. This intrinsic relation has proved particularly important in contexts of

¹¹³ Lessa, *Memory and Transitional Justice*, 21-22.

political and social transition, where memory plays a role in the striving for identity (re-)construction. The discussion on how national governments – both liberal and authoritarian – have reconstructed narratives from the past in a fashion that better legitimized their policies, however, highlights the risk of memory being used as a tool for political ends, making it vulnerable to manipulation by political leaderships and institutions. The presentist approach that was discussed in the chapter provided a good basis for further exploration of this connection between present interests and images of the past. It claims that perceptions of the past are influenced by needs and values that societies share in the present. Law – it was observed – can act as a mechanism through which this process of shaping narratives takes place.

Building upon the presentist argument, I extended this theory to the international legal context, putting forth the core argument of this thesis. Whilst in the era of nationalisms and nation-states, the political shaping of traditions and narratives from the past was mainly a prerogative of governments, which used it to justify and legitimize their authority and political choices, the current political and social order has complicated the landscape of memory-actors. Indeed, in the era of international relations and supra-state institutions, in which more and more political and cultural institutions transcend the national domain, the human rights discourse enters into many of the spheres of state sovereignty, introducing new narrative frameworks into national debates. In this way, I argue, the human rights discourse acts as a vehicle for transposing interests from the international community to national societies. In doing so, flowing into national systems through the human rights and international law methods and tools, it becomes an instrument for influencing the internal dynamics of memory-making processes.

To complicate this scenario even more, the chapter pointed out the specificity of memory-processes in societies emerging from mass violence and systematic abuses of human rights, which are the scope of this thesis. The transitional justice scholarship contributes to delineating the concept of memory from two perspectives. First, it conveys two lessons about how societies should deal with overcoming patterns of violence. On the one hand, it is said that past abuses are to be faced. That is, they cannot be wiped out nor silenced. Memory is to be the way. On the other hand, there cannot be a given general formula to deal with the past. The ways to face the past and the timing for doing so should rest in the hands of each society

themselves. Memory, therefore, should not be imposed from outside. Second, the transitional justice discourse brings some specificity to the concept of memory. Indeed, because of the crucial role of memory in reconstructing national identities, memory is, in these contexts, mainly used as a battlefield for competing political groups to enforce predominance over other groups. Moreover, transitional justice mechanisms – as agents of memory narratives - directly or indirectly impact on the social process of working through past experiences.

A number of insights into the concept of memory have been highlighted so far. Memory is a complex, variable process, which involves communities as much as individuals, moving back and forth like a pendulum from the present to the past.¹¹⁴ To talk about memory implies that we are dealing with a human and social quality rather than with a measurable object; as such, we should be aware of the different stakeholders that interact with, and react to each other in order to negotiate and elaborate memory-narratives within a society. The political power relations that necessarily influence the memory-making process should also be taken into account to grasp all the different forces involved in this process. With all these caveats in mind, I can now turn to the proper analytical part of the thesis: identifying the main components of the duty of memory.

¹¹⁴ The pendulum metaphor was made effective by James Booth, which borrowed it from Durs Grünbein's poem, *Porzellan*: "Then, today ... incessantly it swings back/ and forth, memory, a pendulum." Booth, J. W., "Kashmir Road : Some Reflections on Memory and Violence, Millennium" *Journal of International Studies* 38, no. 2 (2009): 361-377.

Chapter II

The Duty to Ascertain the Truth

Introduction

It has been said that “establishing responsibility for human rights violations, allowing justice to be done and victims to know the truth, requires evidence”.¹¹⁵ In the aftermath of gross violations of human rights, international law firstly demands that responsible governments investigate and disclose the events which constituted grave breaches of human rights. This calls for states to take appropriate action in order to shed light on the past period of violations and offer explanations for abuses. The legal label for this duty is the obligation to investigate human rights violations, which has been defined as a “positive and proactive obligation.” It necessitates the establishment of mechanisms of truth seeking and the setting-up of judicial recourses by governments emerging from post-violence and post-conflict situations.¹¹⁶ This obligation deals with the history of a country – and with its memory – in the sense that it imposes the state to face past atrocities committed in its territory and to dig into them. In this way, it compels states to confront their past without allowing them amnesia or

¹¹⁵ Joinet, P., “Les archives contre l’oubli”, *Le Monde*, June 23, 2004, cited in HRCouncil, *Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, 7 June 2007. UN. Doc. A/HRC/5/7, available at: <http://www.refworld.org/docid/46822ce22.html>, para. 61.

¹¹⁶ See, for instance, UN GA, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Art. 12, available at: <http://www.refworld.org/docid/47fdfaeb0.html>. Particularly meaningful for establishing and defining the state obligation to investigate is the case law of the IACtHR, which will be discussed further in this chapter. Among other cases, see for instance: IACtHR, *Case of Godínez Cruz v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5, para. 187-188; *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 225-226; *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 99-101; *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70; *Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 142-145; *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 289, para. 237-239; IACtHR, *Case of Human Rights Defender et al. v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 202. See also, HRC, *General Comment No. 20: Article 7, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 March 1992, HRI/GEN/1/Rev6 available at: <http://www.refworld.org/docid/453883fb0.html>, paras. 14-15; HRC, *Bleier v. Uruguay*, Comm. No. R.7/30, 24 March 1980, UN. Doc. Supp. No. 40 (A/37/40), para. 13.3; *Dermit Barbato et al. v. Uruguay*, Comm. No. 84/1981, 21 October 1982, UN. Doc. CCPR/C/OP/2, para. 9.6.

silence. Understanding the content, purpose, and standards of this duty will allow us better to unveil a piece of the puzzle that constitutes the ‘duty of memory’.

Both the legal foundation and the content of the obligation to investigate are complex and rich, as well as the purposes it serves. A number of legal provisions as well as legal bodies and institutions have contributed to sketch its contours. In what follows, the foundation and content of the obligation to investigate is examined, looking at the practice of human rights bodies in order to understand how they have performed and developed it. The chapter opens with a theoretical reflection on the relationship between legal investigations and memory, to clarify the relevance of the chapter for the whole discussion on memory. After that, there will be conducted an analysis of the main legal grounds that have been used by international and regional human rights bodies to urge states to respect their obligation to investigate. Then, from these legal grounds, specific standards of compliance are inferred, in order to establish the general requirements of the obligation to investigate in the case of serious violations of human rights. This will allow us to reflect on the extent to which these standards may affect the way states look into their past, and, therefore, the extent to which they are free to enlighten and disclose or, conversely, to hide and cover up, the factual bases on which a shared vision of the past may be founded. The analysis will mostly be performed by means of the jurisprudence of the HRC, the ECtHR, and the IACtHR. Finally, in the last part of the chapter, an overview is presented of the most common mechanisms which have been implemented by states in post-conflict and post-violence contexts to comply with this duty. In doing so, the chapter unfolds the correlation between the duty to investigate and the processes of memory-making, identifying and pointing out the ties that the former imposes on the latter, under international human rights law.

1. Memory and the Duty to Investigate

*The search for, and investigation of, past violations of human rights render the past an eternal present, so as to allow the survivors of the violations to earn their future.*¹¹⁷

Justice requires truth. If victims and their families are to see justice done, they firstly need to have their suffering and harm recognized. Diane Orentlicher observes that uncovering

¹¹⁷ Wieviorka, A. “Entre transparence et oubli”, in *Devoir de mémoire, droit à l’oubli?* ed. Ferenczi, E., (Bruxelles: Editions Complexe, 2002), 182-183, quoted in IACtHR, *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, Separate Opinion of Judge A. A. Cançado Trindade, para. 89.

the truth about past atrocities is a “non-negotiable moral obligation of governments”.¹¹⁸ The lack of investigations into the facts means leaving victims without a name, without dignity. It means to re-victimize the victims of atrocities. Meanwhile, to be aware of the horrific events that happened in the past, of the political and social dynamics which allowed them to happen, is a necessary – although not necessarily sufficient – condition to prevent those events from reoccurring in the future. Moreover, when in a context of democratic transition after the commission of gross human rights violations, the new government opens investigations, it offers a first indication of its political will to come to terms with the past and enter into a new commitment to the rule of law and human rights protection. In these terms, the obligation to investigate becomes a crucial element of doing justice, in its broadest sense.

However, at the same time, the process of uncovering and recovering the past records of the atrocities – the process of bringing to light and telling ‘what really happened’ – determines the writing of narratives. These narratives, in turn, contribute to creating collective memories through processes of social elaboration.¹¹⁹ Indeed, among other elements, the memory-work of a society finds its origins in what has been ascertained, verified, and made public about the facts. With a fascinating etymological interpretation, James Booth reminds us that the Greek word *alētheia* (ἀ-λήθεια) – truth – arises from the negation (ἀ) of oblivion (λήθη), and therefore defines the process of remembrance as the one of “preserv[ing] the truth” of the facts.¹²⁰ By elaborating a narrative of the abuses, claiming the search for truth, and marking the crimes with a public stigma, investigations influence *what* and *how* the society has to remember about the facts that are to be ascertained. Investigations provide an account of those facts, which is subsequently ready to be interpreted and judged by the competent authorities, and to be discussed within the society. They bring the events which lacerated the individuals’ dignity into the public view, and thereby convey them from the individual to the social sphere, waiting for public recognition. They convert private knowledge

¹¹⁸ Orentlicher, D., “Settling accounts revisited: Reconciling Global Norms with Local Agency”. *International Journal of Transitional Justice* 1, no.1 (2007):12.

¹¹⁹ The idea of a “collective remembrance” has been criticized far and wide with the argumentation that groups and collectivities cannot remember together. While certainly agreeing with this sound reflection, here I am referring to the social process of ordering and giving meaning to the events of the past in a way that is widely accepted within the society.

¹²⁰ Booth, J., “The Unforgotten: Memories of Justice”. *The American Political Science Review* 95, no. 4 (December 2001): 781.

into public acknowledgement.¹²¹ Certainly, at this stage, the account they give is just a raw recollection of facts that needs to be further elaborated, explained and assessed. Yet the modalities through which they are investigated influence the way they are represented. Actually, those facts become one of the main sources for the society in the acknowledgement and discussion of its past.

Whether the law should be the instrument through which those facts should be conveyed into a memory-work process, i.e. the process of ordering and giving meaning to the events of the past in the present, is a widely discussed, thorny issue.¹²² The issue belongs in the broader theoretical debate about the role of law in influencing and determining social constructions that we addressed in the previous chapter.¹²³ It also involves the thorny relationship between the two different concepts of historical and judicial truth. From that debate, it has to be acknowledged here that, when historical narratives of the abuses of the past are ascertained through legal instruments, or when the object of those inquiries is established in law, for instance by imposing limits on the mandates of courts and truth commissions *ratione temporis* and *ratione materiae*, the facts ascertained through those legal tools come to have a different, more pregnant, social weight compared to the facts which are ascertained through other means - from media inquiries to historical research. This is the “institutionalized remembrance of the past”.¹²⁴ The legal frame that supports legal (or legally shaped) investigations truly bestows these constructed accounts of the past with a degree of authority and publicity that elevate them in comparison with other accounts. The law gives the findings resulting from those investigations a higher standing which makes them to play a more important role in the multifaceted dynamics of the memory-work.

Therefore, it should remain clear that when international law comes into the modalities of investigations, indicating *how*, *what*, and *when* to investigate, it becomes an agent in the

¹²¹ Cohen, S., “State crimes of previous regimes: Knowledge, accountability, and the policing of the past”, *Law & Social Inquiry* 20, no.1, (1995): 20.

¹²² Osiel, *Mass Atrocity, Collective Memory, and the Law*; Minow, *Breaking the cycles of hatred*; Booths, J., *Communities of memory: on witness, identity, and justice* (Ithaca: Cornell University Press, 2006), 133-143, Savelsberg and King, “Law and Collective Memory”.

¹²³ *Supra*, ch. I, para. 2.1. Löytömäki, in particular, has explored the role of law as an instrument of memory politics for elaborating narratives about, and working through past historical traumas. See, from among her works, the latest *Law and The Politics of Memory. Confronting The Past*. See also Karstedt, *Legal Institutions and Collective Memory* and Hirsch, “Collective Memory and International Law”.

¹²⁴ Booth, “The Unforgotten”, 778.

collective memory-process of a society. The investigations which are shaped according to the instruments and standards prescribed by the corresponding international obligation provide data for the society to process its trauma. Admittedly, the data coming from legal investigations or official truth-seeking inquiries is certainly neither the only, nor necessarily the most important information for the society to develop a commonly shared version of their mournful past. Nevertheless, the power and the authority that this data has because of its legal qualification, enables it to impact strongly on the memory-work within the society. The international obligation to investigate serious human rights abuses is therefore a first aspect in which international law and human rights law impact on the process of memory-making.

2. The Obligation to Investigate Gross Human Rights Violations under Human Rights Law

2.1 Legal Foundation

Despite the fact there are no explicit provisions in the general human rights instruments that specify a legal obligation to conduct investigations, in the human rights arena the existence and foundation of the obligation to investigate is nowadays well established. Beside the specific human rights and humanitarian law conventions and treaties which enshrine it,¹²⁵ international and regional bodies and courts have repeatedly affirmed and asserted the need for a state to bring to light human rights abuses committed in its territory through official and formal investigations. In conjunction, standards and criteria have been elaborated in order to define thresholds for governments to discharge their obligation to investigate. While the very existence of such a legal duty under human rights law is uncontroversial, the ways in which this duty has been rationalized are different. From the analysis of the case law of the

¹²⁵ All the four Geneva Conventions (respectively, *Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field* (First Geneva Convention), 12 August 1949, 75 UNTS 31, Art. 49; *Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Art. 50; *Geneva Convention Relative to Treatment of Prisoners of War* (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Art. 96; 103; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 122; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948. United Nations, Treaty Series, vol. 78, p. 277, available at: <http://www.refworld.org/docid/3ae6b3ac0.html>, Art. 6; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984. United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>, Art. 12; *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html>, Art. 3.

supervisory bodies of the main general human rights instruments, four main lines of reasoning can be pointed out in order to explain the legal roots of the duty to investigate: i) duty to investigate as procedural tool for general protection and enforcement of human rights; ii) investigations as a form of effective remedy and access to justice for victims; iii) duty to investigate deriving from the right to the truth; iv) duty to investigate as a form of reparation in itself for victims of human rights abuses and their families.¹²⁶ These arguments will be used below to better conceptualize the legal basis for a duty to investigate under international law.

2.1.1 “Ensure and protect” clause

Human rights law imposes a primary, general obligation to respect, ensure, and protect rights on states. This general obligation places two main sets of duties on states: obligations to abstain from violating substantive rights; and obligations to ensure their effective protection and enjoyment by individuals. While the first set of negative obligations entails omissive behaviours that states are to maintain, the latter imposes positive actions to be undertaken. As a consequence, for states to fulfil their obligations under human rights law, refraining from infringing human rights will not suffice. They are also obliged to proactively take steps in order to secure and protect those rights. Among the number of positive obligations that human rights judicial and quasi-judicial bodies have derived from the extensive interpretation of the most fundamental rights, the obligation to conduct investigation has been considered an essential instrument of protection.¹²⁷ In fact, the need to have violations appropriately and competently investigated and clarified has been considered so essential that it is to be deemed a constitutive part of the same rights protected. In this regard, in its General Comment on the nature of general legal obligations imposed on states parties, the HRC expressed the view that:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹²⁸

¹²⁶ A similar conceptualization is put forth with regard with the state obligation to prosecute in Seibert Fohr, A., *Prosecuting Serious Human Rights Violations*. (Oxford; New York: Oxford University Press, 2009), 196-212

¹²⁷ Seibert-Fohr, *Prosecuting serious human rights violations*, 193.

¹²⁸ HRC, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.refworld.org/docid/478b26ae2.html>.

The doctrine of positive obligations thusly provides a first legal basis to found the duty to investigate on.¹²⁹ In this conceptualization, the duty to investigate is considered part of the procedural dimension of the same substantive right from which it emerges, since it is viewed as instrumental for securing its effective implementation.¹³⁰ In this interpretation, therefore, the duty to investigate has been considered a matter of primary protection.

Following the doctrine of positive obligations, both the European and the American systems, respectively the ECtHR and the IACtHR have derived the obligation to conduct investigations from the conjoined reading of the general guarantee clauses enshrined in the regional human rights conventions and the substantive rights included therein.¹³¹ The IACtHR has developed its jurisprudence on this matter extensively. The Court has rooted the rationale for the duty to investigate in different arguments, ranging from preventative to remedial functions.¹³² The construction of the duty to investigate as a guarantee for the general interest of protection of human rights has been put forth since the outset of its jurisprudence. Already in *Velásquez Rodríguez*, the Court recognized that the responsibility of a state can be established also for acts which cannot be directly imputed to its organs, because of the failure to prevent or to respond to misconducts.¹³³ The Court interprets a duty to prevent and respond as part of the state obligation to ensure the “free and full exercise of the rights recognized by

¹²⁹ On the positive obligation doctrine - in particular with regard to the ECtHR case law - see, *inter alia*, Xenos, D., *The positive obligations of the state under the European Convention of Human Rights*, (London: Routledge, 2011); Mowbray, A.R., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (London: Bloomsbury Publishing, 2004); Lavrysen, L., “The scope of rights and the scope of obligations: positive obligations”, in *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*, ed. Brems, E., Gerards, J. (New York: Cambridge University Press, 2014), 162-182. On the Inter-American Court of Human Rights’ jurisprudence, see Burgorgue-Larsen, L., *The Inter-American Court of Human Rights: case-law and commentary* (Oxford: Oxford University Press, 2010); and Shelton, D., “The Jurisprudence of the Inter-American Court of Human Rights”, *American University International Law Review* 10, no. 1 (1996): 333-372.

¹³⁰ See, for instance, IACtHR, *Case of the “Mapiripán Massacre” v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, paras. 232-233; and ECtHR, *Sevtap Veznedaroglu v. Turkey*, App. No. 32357/96. Judgment of 11 April 2000, para. 32.

¹³¹ Council of Europe (CoE), *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [ECHR], Art. 1; Organization of American States (OAS), *American Convention on Human Rights, “Pact of San Jose”, Costa Rica*, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [ACHR], Art. 2.

¹³² It has to be noted that the Court is not always clear in distinguishing these two rationales, and their foundations and borders often blur in the American case law. See *infra*.

¹³³ IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, para. 172.

the Convention”, which, in turn, establishes an obligation to “prevent, investigate and punish any violations”, and, when possible, provide for reparations.¹³⁴ Since that decision, the duty to investigate has been continuously linked to the content of the general duty to ensure and protect.

Similarly, the ECtHR has inferred the duty to investigate, arguing from the dual dimension of human rights. According to the Court, each right entails a substantial and a procedural dimension, which are independent from each other.¹³⁵ The duty to investigate violations of substantive rights is part of the procedural protection of rights that states owe individuals within their jurisdiction.¹³⁶ The independence of the two dimensions allows for a conceptual division between two different infringements: the one affecting the victim’s substantive right, and the one impinging on the procedural requirements which the substantive part dictates. The lack of responsibility for a substantial violation of rights does not necessary discharge the full set of obligations that states bear under the European Convention.¹³⁷ This argument has greatly extended the protection of human rights in the European system. Indeed, it has allowed the Court to establish the liability of a state even when the direct violation of the substantive right could not be ascribed to state agents; moreover, in recent developments, it has also founded the state responsibility even with regards to abuses which had occurred before the date of the entry into force of the European Convention with respect to that state. In this sense, the procedural obligation to investigate extends the Court’s jurisdiction *ratione temporis* toward the past.¹³⁸

¹³⁴ Ibid., para. 166.

¹³⁵ ECtHR [GC], *Varnava and others v. Turkey*, App. Nos. 16064/90 et al. Judgment of 18 September 2009, para. 147.

¹³⁶ ECtHR, *Association "21 December 1989" and Others v. Romania*, App. No. 33810/07. Judgment of 25 May 2011, para. 133.

¹³⁷ ECtHR, *Yasa v. Turkey*, App. No. 22495/93. Judgment of 2 September 1998, paras. 98 -100.

¹³⁸ ECtHR, *Association "21 December 1989" and Others v. Romania*, paras. 116-118; *Janowiec and Others v. Russia*, App. Nos. 55508/07 29520/09. Judgment of 21 October 2013, paras. 141-142. It is interesting to note that, in respect of the most serious international crimes, the “convention values” test constitutes an exception to the standard of the “genuine connection” between the event and the entry in force of the Convention, which is usually required to ground the procedural obligation to investigate the violation of a substantive right. In these cases, hence, “the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention [...] constitute a sufficient basis for recognising the existence of a connection”, and therefore for establishing the state’s the procedural obligation to investigate. However, the Court has refused to extend this exception to violations committed prior to the adoption of the Convention. *Ibid.* paras 149-151.

Enshrined in this conceptualization, there is a clear general preventative rationale, which has proved important for the discourse on the fight against impunity. In the *Maritza Urrutia* judgment, a case on torture, the IACtHR considered that the lack of investigation into the facts had allowed the acts of torture to go unpunished. On this basis, it found the responsibility of the state in that it failed “to take effective measures to avoid acts of this nature being repeated within its jurisdiction”.¹³⁹ Indeed, the Court considers the very same definition of impunity as “the absence of any investigation, pursuit, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention”.¹⁴⁰ As a consequence, “the State has the obligation to combat that situation with all available legal means, because impunity leads to the chronic repetition of human rights violations and to the total defenselessness of the victims and their next of kin”,¹⁴¹ and therefore it “is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved”.¹⁴² Hence, the general protection clause entails appropriate investigations as a matter of prevention.

Like the Inter-American Court, the European Court of Human Rights has developed the general prevention argument as a legal reasoning to enforce the procedural obligation to investigate. Adjudicating on a case of alleged unlawful killings by the security forces of the UK, the Court affirmed that the lack of established procedures of investigations on the use of force by state agents would deprive the substantive right to life of any effectiveness. Based on this, the Court notes that

[t]he obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should

¹³⁹ IACtHR, *Case of Maritza Urrutia v. Guatemala*. Judgment on Merits, Reparations and Costs. November 27, 2003, para. 129.

¹⁴⁰ IACtHR, *Case of the 19 Merchants v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 175.

¹⁴¹ IACtHR, *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala*. Preliminary Objections. Judgment of January 25, 1996. Series C No. 23, para. 173.

¹⁴² IACtHR, *El Caracazo Case*. Reparations and Costs. Judgment of August 29, 2002. Series C No. 95, para. 117. Similarly, *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110, para. 132; *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 255.

be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State.¹⁴³

The Court extended this argument also to violations of other fundamental rights. In an alleged case of torture, in which it had been impossible to ascertain the responsibility of state agents for acts of torture (Article 3), the Court declared the state responsible for the violation of the state duty to conduct an investigation “capable of leading to the identification and punishment of those responsible”. The Court argued on the grounds of the procedural dimension of Article 3. Unanimously, the Court maintained that in the absence of such an obligation to investigate,

the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (...), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.¹⁴⁴

Impunity, again, becomes a primary basis on which the duty to investigate comes to play an important role of prevention and general guarantee for the whole society. The lack of investigation is deemed instrumental in exacerbating situations of continuous impunity. As a matter of fact, this would jeopardize the system of rights protection and its effectiveness.¹⁴⁵ From this perspective, hence, the procedural dimension of rights requires investigations into human rights violations as a form of deterrence from future abuses.

The conceptualization of the duty to investigate as a matter of human rights protection has been interpreted as also including the protection of individual rights in individual claims. In this second perspective, the state obligation to ensure rights would entail the right of victims to have their violations investigated not only as a matter of general prevention, but also as a matter of individual protection, specific to the single victim. When turning from the general preventive rationale to the effective protection of individual rights, however, understanding the duty to investigate is not so straightforward. It is true that the main human rights bodies have easily and often linked the lack or insufficiency of investigative proceedings to the

¹⁴³ ECtHR, *McCann and others v. The United Kingdom*. App. No. 18984/91. Judgment of 27 September 1995, para. 161. The same *dictum* was reiterated by the Court in subsequent decisions. E.g. *Kaya v. Turkey*. App. No. 22729/93. Judgment of 19 February 1998, paras. 86-87; *Kiliç v. Turkey*. App. No. 22492/93. Judgment of 28 March 2000, para. 78; *Aktas v. Turkey*. App. No. 24351/95. Judgement of 24 April 2003, para. 5; *Leonidis v. Greece*. App. No. 43326/05. Judgment of 8 January 2009, para. 67.

¹⁴⁴ ECtHR, *Assenov and others v. Bulgaria*. App. No. 24760/94. Judgment of 28 October 1998, para. 102.

¹⁴⁵ Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, 198-204.

violation of the individual right (e.g. the right to life). In doing so, they have suggested that investigations should be conducted in the specific interest of the victim. Nevertheless, the conceptualization of the duty to investigate in terms of procedural obligations originating from substantive rights is still confusing somehow. Whilst the general prevention argument that upholds the duty to investigate is easily understandable on the basis of the deterrent rationale, the construction of the duty to investigation as a preventative tool for the specific violation of the individual's substantive right about which it inquiries is not convincing. It is hard to understand how a subsequent investigation into the facts that lead to the violation of the individual right could ensure or protect the right infringed in the present. Anja Seibert-Fohr proposes an explanation for this jurisprudence through the concept of "retrospective protection", that is the application of measures of prevention after the infringement of the substantive right (*ex post facto*), to secure the right of the individual retrospectively.¹⁴⁶ Even though this interpretation sounds very appealing, it too extensively overlaps with the remedial rational of the duty to investigate (which I will discuss below). This discourages the need for a different and separate conceptualization. It seems therefore preferable to keep the remedial interpretation when talking about a duty to investigate from the perspective of victims' rights.

Shaping the duty to investigate in terms of either general prevention or individual protection has important practical consequences for determining the specific content of the duty to investigate. In the first case, if investigations are undertaken in the interest of prevention of the general society, individuals cannot claim against the state for failing to conduct inquiries, unless it is proven that such a situation of impunity also conditioned the violation of substantive rights of the individual. In the second case, if investigations are ordered to ensure individual rights, the victims can claim the negligence of the state in investigating the violations, but only within the limits of the specific case.

Bringing these arguments to the specific focus of my dissertation, the consequences of such interpretative divergences are likely to have an impact on the memory-making process in that the scope of the inquiries changes, and thereby their outcomes as well. Indeed, an investigation required for the satisfaction of an individual right would bring to light those events which are specifically intended to reaffirm the individual right that was infringed. If

¹⁴⁶ Ibid., 126 – 132.

other aspects come to light, they would be considered only if, and to the extent to which, they support or oppose the individual claim. Conversely, if investigations are performed for the sake of the general protection of the society, the aspect of deterrence comes to the fore. Investigations are to be undertaken to prevent situations of general impunity, where individual rights can be violated without the perpetrators being held accountable. To avoid such a situation, for the rule of law to be re-affirmed, the whole framework of illegality has to be brought to light and publicly recognized. The society has to know which dynamics led to the generalized abuses, and, consequently, the whole historical narrative has to be uncovered and publicly conveyed.

2.1.2 Right to an effective remedy

In addition to the effective protection clauses spelled out in the main human rights instruments, the Human Rights Committee, the Inter-American Commission and Court, and the European Court of Human Rights have been consistently deriving a general duty to conduct investigations from the individual right to an effective remedy. In fact, this probably has been the traditional conceptualization for this duty. As is known, the right to a remedy is the individual entitlement of victims to enter accessible and effective procedures and mechanisms to vindicate their rights and to obtain redress.¹⁴⁷ Because it is held to be a fundamental guarantee for the effective protection of primary rights, secondary norms that establish both substantial and procedural remedies are contained in almost all the multilateral human rights treaties.¹⁴⁸ Besides the textual scope of the provisions, the right to a remedy has been expanded by judicial interpretation. It has been considered an absolute right, non

¹⁴⁷ HRC, *General comment No. 31* [80], para. 15.

¹⁴⁸ UDHR, Art. 8; ICCPR, Art.2 (3); ECHR, Art. 13; ACHR, Artt. 8 (1) and 25; *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, UN. Doc. E/CN.4/RES/1992/29, available at: <http://www.refworld.org/docid/3b00f0b270.html>, Art. 9 and 13; *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, available at: <http://www.refworld.org/docid/3ae6b38ef.html>, Art. III(1); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [CAT], 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>, Art. 13; *International Convention on the Elimination of All Forms of Racial Discrimination* [CERD], 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html>, Art. 6. The right to an effective remedy is also contemplated in many soft law documents for the promotion of human rights. As an example: UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly*, 29 November 1985, UN. Doc. A/RES/40/34, available at: <http://www.refworld.org/docid/3b00f2275b.html>, Principles 4 -7; UN GA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* [UN Basic Principles on Reparations]: resolution adopted by the General Assembly, 21 March 2006, UN. Doc. A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html>, Principles VII-IX.

derogable in nature.¹⁴⁹ In its broad interpretation, it encompasses both a procedural and a substantial dimension. While from the latter viewpoint it mostly refers to the victim's right to obtain reparations, in its procedural dimension it entails the right of individuals to bring a claim before competent and impartial authorities, and to have their claim heard and adjudicated.¹⁵⁰

The procedural dimension in particular has provided the legal basis of the duty to investigate under the remedial rationale. In this sense, the right to a remedy has been interpreted as requiring effective, prompt, and impartial investigation as a precondition for access to justice, and, therewith, right vindication mechanisms.¹⁵¹ The human rights supervisory bodies have repeatedly stated that the absence of an official and thorough investigation would deprive victims of the possibility to identify those responsible for the abuses they suffered, to collect evidence, and consequently successfully bring their claims to appropriate *fora* to obtain redress.

The ECtHR has created a consistent body of judgments in which it has understood Article 13 of the ECHR as embracing the states' obligation to carry out effective investigations on allegations of violations to the rights of the Convention. The Court has declared that in the case of the

most fundamental [rights] on the scheme of the Convention (...) the notion of an effective remedy for the purposes of Article 13 entails (...) a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.¹⁵²

¹⁴⁹ In this regard, the HRC, *General Comment No. 29: Article 4, Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.refworld.org/docid/453883fd1f.html>, paras. 11 and 14. The Committee demands that state parties comply with the fundamental obligation to provide a remedy that is effective even in a state of emergency.

¹⁵⁰ See, *inter alia*, Shelton, D. *Remedies in international human rights law* (Oxford; New York: Oxford University Press, 2005), 7 -10; Francioni, F., "The Rights of Access to Justice under Customary International Law", in *Access to Justice as a Human Right*, ed. Francioni, F. (New York: Oxford University Press, 2007), 1-55.

¹⁵¹ On various occasions, the ECtHR has affirmed that the duty to proceed to a prompt and impartial investigation "is implicit in the notion of an 'effective remedy' under Article 13", *Aydın v. Turkey*, App. No. 23178/94. Judgment of 25 September 1997, para. 103.

¹⁵² ECtHR, *Aydın v. Turkey*, App. No. 23178/94. Judgment of 25 September 1997, para. 103 para. 107 and *Kaya v. Turkey*, App. No. 225335/93. Judgment of 28 March 2000, para 124. In the same sense, see also ECtHR [GC], *Öneryıldız v. Turkey*, App. No. 48939/99. Judgment of 30 November 2004, para. 149; *McKerr v. United Kingdom*, App. No. 28883/95. Judgment of 4 May 2001, paras.159, 170-171. The same position had

By means of this argument, the Court has extended the scope of Article 13 as requiring effective investigations in cases involving abuses to Article 2 (right to life),¹⁵³ torture and ill treatment (Article 3),¹⁵⁴ slavery and human trafficking (Article 4),¹⁵⁵ and forced disappearance (Article 5).¹⁵⁶ Similarly, the HRC has emphasized that “responsibility for investigations falls under the State party’s obligation to grant an effective remedy”.¹⁵⁷

In the Inter-American system, the duty to investigate as a corollary of the right to a remedy has been further developed from the viewpoint of individual rights. The Court has elaborated its reasoning by taking its usual victim-centric approach. Since the *Durand and Ugarte* case, it has interpreted the joint reading of Articles 8 (judicial guarantees) and 25 (judicial protection) as the framework for recognizing a “right to justice” for victims.¹⁵⁸ According to the Court, while Article 25 requires states to adopt mechanisms to grant victims the effective access to instruments of vindication of rights, Article 8 sets the parameters of the due process which these mechanisms are to comply with in cases of the most serious violations. As a consequence of that argumentation, the Court has recognized a sort of victims’ right to have violations of fundamental rights investigated not only by civil or administrative, but also by criminal courts and authorities. This right is now established in the Inter-American jurisprudence.¹⁵⁹ Whether this interpretation also leads to the victims’ right to have their perpetrators prosecuted and punished is an interesting line that cannot be dealt with in the

already been expressed by the Court in the case of *Aksoy v. Turkey*, in which the Court defined the duty to investigate as “implicit in the notion of an ‘effective remedy’ under Art. 13”. App. No. 21987/93. Judgment of 18 December 1996, para. 98; similarly in *Aydın v. Turkey*, para. 103.

¹⁵³ ECtHR, *Kaya v. Turkey* (2000), para. 124.

¹⁵⁴ ECtHR [GC], *Salaman v. Turkey*, App. No. 21986/93. Judgment of 27 June 2000, paras. 121-123.

¹⁵⁵ ECtHR, *C.N. v. United Kingdom*, App. No. 4239/08. Judgment of 13 November 2012, para. 76; *Rantsev v. Cyprus and Russia*, App. No. 25965/04. Judgment of 7 January 2010, para. 240. In these cases, however, the link between the state duties to investigate and to provide victims with effective remedies was examined as a procedural aspect of the substantive right.

¹⁵⁶ ECtHR, *Kurt v. Turkey*, App. No. 24276/94. Judgment of 25 May 1998, para. 140; ECtHR [GC], *Çakıcı v. Turkey*, App. No. 23657/94. Judgment of 8 July 1999, paras. 113-114.

¹⁵⁷ HRC, *Rodríguez v. Uruguay*, Comm. No. 322/1988, 9 August 1994, UN. Doc. CCPR/C/51/D/322/1988, para. 12.3.

¹⁵⁸ IACtHR, *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 130. On the victims’ right to justice see Spiga, V., The right to justice for victims of human rights crimes, (Ph.D. thesis, European University Institute, 2014) and “No Redress without Justice. Victims and International Criminal Law”, *Journal of International Criminal Justice* 10, No. 5 (2012): 1377-1394.

¹⁵⁹ IACtHR, *Case of Chitay Nech v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 197. *Case of Goiborù v Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 165.

present discussion.¹⁶⁰ However, it is important to note here that, while the duty to investigate - derived from the right to an effective remedy *tout court* -, is mainly constructed to serve the interest of offering restoration for victims, as it is in the case law of the ECtHR and HRC, the interpretation provided by the IACtHR makes that, whenever investigations into serious human rights abuses are neglected to be carried out or conducted in an inadequate or ineffective manner, the state is always responsible for denial of justice, notwithstanding whether or not the victims could have access to different remedies.¹⁶¹ In this interpretation, investigation becomes the object of legitimate claims of victims, even if and when alternative mechanisms of redress have been put in place for them.

The duty to investigate applies not only to the crimes committed by the current government, but also to the ones having taken place during previous regimes.¹⁶² On this basis, the Human Rights Committee has used the right to a remedy even to deny the validity of amnesty laws enacted in Latin-American countries, since they “prevent(...) relevant investigation and punishment of perpetrators of past human rights violations”.¹⁶³ In so doing, the Committee says, they hamper any administrative or civil process of adjudication, and deny victims the right to pursue any form of reparations.¹⁶⁴ In the same vein, the IACtHR elaborated its jurisprudence on the inadmissibility of amnesties, relying *inter alia* on the argument that

[t]his type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from

¹⁶⁰ This question is discussed at length in Seibeth Fohr, *Prosecuting Serious Human Rights Violations*, ch. 2, sec. 2.3.A; ch. 3, sec. 2.2.B.b; ch. 4, sec. 2.3.A; ch. 6, sec. 1.1.A, sec. 3.1.A-B. As Seibeth Fohr points out, the ECtHR has steadfastly rejected the idea of the existence of such a “right to justice”, and therefore has refused to recognize an individual right to claim in criminal processes. See, lastly, *Gray V. Germany*. App. No. 49278/09. Judgment of 22 May 2014, para. 81. In the same regard, HRC, *Rodríguez v. Uruguay*, para. 6.4.

¹⁶¹ In fact, the Court scrutinizes the lack of investigation on the basis of the judicial guarantees provided by arts. 8 and 25 ACHR. See, e.g., IACtHR, *Case of Gutiérrez and Family v. Argentina*. Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 271, para. 97-99, 126-131.

¹⁶² HRC, *Rodríguez v. Uruguay*, para. 12.3.

¹⁶³ HRC, *Comments on El Salvador*, 18 April 1994, UN. Doc. CCPR/C/79/Add.34, paras. 7; 12.

¹⁶⁴ *Ibid.*, para. 7; HRC, *Concluding Observations on Chile*, 30 March 1999, UN. Doc. CCPR/C/79/Add.104, para. 7. On the international law regime on amnesties and its relevance on memory see, Della Morte, G., *Le amnistie nel diritto internazionale*, (Milano: CEDAM, 2011) and , “The Duty of Memory and the Right to Oblivion”. *International Criminal Law Review* 14 (2014): 427-440.

knowing the truth and receiving the corresponding reparation. For this reasons, amnesties violates the right of victims to judicial protection.¹⁶⁵

In line with the ‘ensure and protect argument’ presented above, the interpretation of the duty to investigate as part of the right to an effective remedy entails that its infringement is independent from the abuse of the primary right from which it stems. In this sense, in its General Comment on the nature of the general legal obligations imposed on states parties, the HRC expressed the view that a “failure to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant” in relation to the victims right to an effective remedy. As a result, in many decisions in which a lack of investigation was found, the human rights adjudicatory bodies held states accountable for a double violation, both of the substantive right and of the secondary obligation to provide effective remedy.¹⁶⁶ Contrary to the previous reasoning, however, the conceptualization of the duty to investigate as a remedy brings it to the framework of secondary norms. Indeed, because the right to a remedy arises only after a violation of primary rights occurs, the obligation to investigate is constructed as a secondary obligation. Consequently, a failure in investigating the facts can cause the state to be held responsible for the violation of the right to a remedy only if and when the infringement of the primary right is proven.¹⁶⁷ Individuals, moreover, cannot claim their right to a remedy as a legal basis to expect states to investigate violations committed by third parties.

Deriving an obligation to investigate from the individual right to have access to effective remedies is meaningful also in other respects. Firstly, the remedial entitlement being the source of the duty, the scope of the latter will be defined by the purpose of the former. That is to say that, except in the American system, an investigation is always required to the extent of, and limited to, satisfying the right to an effective civil or administrative remedy. In this sense, the European Court understands the duty to investigate, inferred from Article 2,

¹⁶⁵ IACtHR, *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 43.

¹⁶⁶ E.g., ECtHR, *Ergi v. Turkey*, App. No. 23818/94. Judgment of 28 July 1998, paras. 82-85, 98; *Kaya v. Turkey* (1998), paras. 86-87, 107-108; *Contra*, see the Partly Dissenting Opinion of Judge Gölcüklü in *Kaya v. Turkey* (1998), para. 13, referring to a number of decisions taken by the Commission in contrast with this approach.

¹⁶⁷ The European Court seems to suggest this reading in the *Ilhan* case; in that case it maintained that, since the Court had ascertained the violation of Art. 3 of the Convention, the lack of effective investigation by the authorities was to be dealt with under the provision on effective remedy (Art. 13). ECtHR, [GC], *Ilhan v. Turkey*, cit., paras. 92-93.

broad than the one derived from Article 13, because the scope of the latter is narrowed down by the remedial aim it aspires to. That is, investigations carried out on the basis of Article 13 are limited to ascertaining whether the lack or deficiencies in the investigative proceeding have affected the individual right to access to a remedy.¹⁶⁸ Taken to an extreme, this reasoning would lead to arguing that, at least in the European and UN system, when victims can access different proceedings to obtain redress for the infringement of their rights, an investigation may be considered superfluous, and its lack would not entail a violation of the right to an effective remedy. In this case, the lack of investigation would become legally relevant only from the viewpoint of the (procedural dimension of the) substantive right which is deemed infringed.

2.1.3 Right to truth

The right to truth has been firstly and mostly conceptualized within the Latin American continent and its regional institutions of human rights. In the last decades, however, it has overcome the geographic boundaries of that region, and has come to take a place within the international human rights *fora*. The legal dimension of the right to truth has been crystallized in an increasing number of international legal instruments and national legislations in the last decades, and it has been increasingly advocated by human rights bodies and courts. It has alternatively been considered a guiding principle or a legal entitlement, and, in the latter case, it has either been accounted an autonomous right or, more often, inferred from other rights.¹⁶⁹ Since its legal justification arises from different legal sources, the right to the truth describes a set of different entitlements for victims, at the same time looking toward the investigation of the past and the disclosure of the facts in the present. The full implementation of such a right, therefore, imposes a number of different duties on states at different levels. Despite the fact

¹⁶⁸ ECtHR [GC], *Öneryildiz v. Turkey*, para. 149.

¹⁶⁹ Literature exploring the meaning of truth is extremely varied, and embraces the most different perspectives. For an account of the debate on turning the concept of truth into a legal concept and its evolution in international law, see, among many others, Mendez, J. E., “The Right to Truth”, in *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17–21 September 1998*, ed. Joyner C.C., Bassiouni, M.C., (Ramonville St. Agnes: Eres, 1998) and, by the same author, “Individual Accountability for Human Rights Violations”, in *Global Standards, Local Action: 15 Years Vienna World Conference on Human Rights*, eds Benedek, W., et al., (Intersentia, 2009), 69-71; at the regional level, see Méndez, Juan E. “An Emerging ‘Right to Truth:’ Latin-American Contributions.” In Karstedt, *Legal Institutions and Collective Memories*, 39-61. From a philosophical perspective, it is also worth mentioning Ignatieff, M., “Articles of Faith”, in *Index of Censorship* 25, no. 5, 1996, 110-122: “One should distinguish between factual truth and moral truth, between narratives that tell what happened and narratives that attempt to explain why things happened and who is responsible.”

that its contours still remain rather vague, in cases of gross violations of human rights, the right to the truth has been included in the set of victims' entitlements. Indeed, practice shows that, when there have been mass patterns of violence where human rights were infringed, victims have a right to know the truth. That is to say, in a nutshell, victims are entitled to

know (...) the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.¹⁷⁰

The obligation to investigate is necessarily an essential element in the satisfaction of such entitlement. Conducting investigations to ascertain the facts that amounted to human rights abuses is clearly a precondition for ensuring that victims and their families get to know those facts, and therefore for allowing them to exercise their right to truth. In spite of the intuitive connection between the right to truth and the duty to investigate, their relationship has mostly been explored at the level of soft law. In fact, both the European and the UN's (quasi-) adjudicatory bodies of human rights protection have been rather cautious in enforcing the protection of this right as such, and, therefore, in establishing a direct nexus between the right to truth and the obligation to investigate.¹⁷¹ The Inter-American institutions are an exception to this approach. Contrary to their international and European colleagues, they have been straightforward in drawing a logical and normative link between the two. It will be interesting, thus, to start this overview on the correlation between the right to truth and the duty to investigate with a survey of the Inter-American case law.

¹⁷⁰ CHR, *Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, 8 February 2006. UN. Doc. E/CN.4/2006/91, available at: <http://www.refworld.org/docid/46822b6c2.html>, para. 59. Similarly, IACtHR, *Velásquez Rodríguez v. Honduras*, para. 177.

¹⁷¹ See, however, ECtHR, *Association "21 December 1989" and Others v. Romania*, para.144; see also the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller in the recent *Janowieck* case, in which the judges observe that "in international law there is a clear trend towards recognising a right to the truth in cases of gross human rights violations". To support this argument, they refer to previous case law of the Human Rights Committee (HRC, *Mariam, Philippe, Auguste and Thomas Sankara v. Burkina-Faso*, Comm. 1159/2003, para. 12.2, and *Schedko and Bondarenko v. Belarus*, Comm. 886/1999, para 10.2) and the ECtHR (*El Masri v. "the former Yugoslav Republic of Macedonia"* [GC] (2012), para. 191; *Varnava and Others v. Turkey* [GC] (2008), paras. 200-02; *Association "21 December 1989" and Others v. Romania*, (2011) para. 144.) ECtHR, *Janowiec and Others v. Russia*, Joint Partly Dissenting Opinion, para. 9.

Already in *Velasquez Rodriguez*, one can find some insights of the Court's approach to the right to truth, although still at an embryonic stage. As the reader will remember, in that first case, the Court recognized the state's obligation to investigate, as an instrument to ensure the full enjoyment of the rights enshrined in the American Convention. In the light of this, the Court demanded that the state "use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains".¹⁷² In that early stage, however, the families' right to know the fate of their next of kin was considered a "reasonable expectation" worth being protected.¹⁷³ It was years later, on the wave of the international discussion about the nature and foundation of a victims' right to truth within the UN bodies,¹⁷⁴ that the Court began to conceptualize this individual interest as a legal entitlement.

Admittedly, however, since *Bámaca-Velásquez*, the Court has developed a rather confusing and inconsistent framework to normatively found the right. Already in that first case, the Court recognized that the state's refusal to allow the family of the victim to learn about the facts and to locate the victim's remains as an act of cruel, inhuman, and degrading treatment, therefore in breach of Article 5 of the Convention. At the same time, however, the Court constructed the right to truth as subsumed under the victims' right to obtain clarification of both the facts and the corresponding responsibilities regarding the violations "through the investigation and prosecution established in Articles 8 and 25 of the Convention".¹⁷⁵ Furthermore, in the corresponding judgment on reparations, it defined the right to the truth as

¹⁷² IACtHR, *Velásquez Rodríguez v. Honduras*, para. 181.

¹⁷³ The relatives' right to know truth about the fate of their next-of-kin was originally recognized in the field of Humanitarian Law. Art. 32 AP-I See *infra*, Ch. III.

¹⁷⁴ Within the UN, a large number of soft law documents have been adopted with regard to the right to truth. See the above cited CHR (OHCHR), *Study on the right to the truth*. See also CHR, *Human Rights Resolution 2005/66: Right to the Truth*, 20 April 2005. UN. Doc. E/CN.4/RES/2005/66, available at: <http://www.refworld.org/docid/45377c7d0.html>; HRCouncil, *Resolution 9/11: Right to the Truth*, 18 September 2008. UN Doc. A/HRC/RES/9/11 and *Resolution 12/12: Right to the Truth*, 25 September 2009. UN. Doc. A/HRC/12/L.27. HRCouncil, *Resolution 21/7: Right to the Truth*, 24 September 2012. UN. Doc. A/HRC/21/L.16. See also the work of the UN WG on Enforced or Involuntary Disappearances, in particular the *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, available at: [http://www.ohchr.org/Documents/Issues/Disappearances/GC-right to the truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right%20to%20the%20truth.pdf). Other soft law instruments recognize the victim's right to truth in cases of gross and systematic human rights violations. See the above-mentioned *Updated Set of Principles to Combat Impunity*, Principle 4; and the *UN Basic Principles on Reparations*, Principle X.

¹⁷⁵ IACtHR, *Case of Bámaca-Velásquez v. Guatemala*. Merits, para 201.

a form of satisfaction in itself, and, therefore, as “an expectation regarding which the state must satisfy the next of kin of the victims and society as a whole”. In only one case, thus, the right to the truth was considered: i) protected by the general prohibition of torture, inhuman and degrading treatments; ii) part of the substantive right “to obtain clarification of the events”; iii) a remedial measure; iv) a legitimate expectation of both the victim and the whole society. In the subsequent case law, while the victims’ right to the truth was constantly reaffirmed and upheld under different interpretations, the Court has not further clarified its line of argument with regard to its legal basis.

Turning away from the American region and its institutions, the relation between the right to truth and the duty to investigate has been highlighted in the international system in a number of soft law instruments instituted by UN bodies.¹⁷⁶ Enforced disappearance and the fight against impunity have been the two major domains in which this relation has been examined. Against this background, the state duty to conduct prompt and effective investigations has been conceptualized as a corollary of the victims’ right to know the truth about mass and widespread human rights violations. The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, in the updated report presented by the independent expert Diane Orentlicher to the former Human Right Commission (hereinafter: Principles to Combat Impunity or Set of Principles), after affirming that “[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through mass or systematic violations, to the perpetration of those crimes”, meaningfully indicates mechanisms of inquiry and investigation under the title of “guarantees to give effect to the right to know”.¹⁷⁷ Under the UN Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter Basic Principles on Reparations), the duty to investigate is not directly linked to the victims’ entitlement to know the truth, and it is rather conceived both as part of the scope of the general duty to ensure, respect, and implement rights, and as a remedial form of satisfaction for victims.¹⁷⁸ The Chicago Principles on Post-

¹⁷⁶ See *supra*, fn. 174.

¹⁷⁷ CHR, *Updated Set of Principles to Combat Impunity*. Principles 1 and 5.

¹⁷⁸ UN *Basic Principles on Reparations*, II.3.b) and IX.22.b). For a discussion of the *Basic Principles on Reparations* in the framework of the victims’ right to reparation see *Infra*, Ch.V.

Conflict Justice, finally, recommend that states conduct formal investigations through a multi-level system of truth-seeking mechanisms, *in primis* truth commissions.¹⁷⁹ This recommendation is functional in the broad understanding of the right to truth that the Chicago Principles embrace. This goes far beyond the right of victims to get to know about circumstances and facts related to the violations they suffered, but also extends to the knowledge of “general information regarding patterns of systematic violations, the history of the conflict and the identification of those responsible for past violations”, both for the victims and their relatives and for the general society. In this approach, the obligation to investigate would clearly require states to carry out an extensive clarification of the whole historical context in which the abuses took place.

Also in the practice of international bodies and institutions, the relation between the state obligation to investigate and the victims’ right to truth was reinforced. In a number of documents and decisions, most human rights bodies - such as the Human Rights Council,¹⁸⁰ previously the Commission on Human Rights,¹⁸¹ the Office of the High Commissioner for Human Rights,¹⁸² the Working Group on Enforced or Involuntary Disappearances,¹⁸³ the OAS General Assembly,¹⁸⁴ the Inter-American Commission on Human Rights,¹⁸⁵ as well as the Parliamentary Assembly of the Council of Europe -¹⁸⁶ have recognized the victims’ right to the truth, both in the context of the crime of enforced disappearance and in relation to other serious human rights abuses. Each of these documents refers to the duty to investigate.

¹⁷⁹ *Chicago Principles on Post-Conflict Justice* [hereinafter *Chicago Principles*]. (Chicago: The International Human Rights Law Institute, 2008). Principle 2: “States shall respect the right to truth and encourage formal investigations of past violations by truth commissions or other bodies.”

¹⁸⁰ HRCouncil, *Resolution 12/12*, and *Resolution 9/11*.

¹⁸¹ CHR, *Human Rights Resolution 2005/66: Right to the Truth*.

¹⁸² CHR (OHCHR), *Study on the Right to the Truth*; and HRCouncil, *Right to the Truth*, A/HRC/5/7.

¹⁸³ UN WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*.

¹⁸⁴ See, inter alia, OAS AG/Res. 2175 (XXXVI-O/06), 6 June 2006, ‘*Right to the Truth*’. Since then, resolutions on the victims’ right to the truth have been included in each annual report: AG/Res. 2267 (XXXVII-O/07), 5 June 2007; AG/Res. 2406 (XXXVIII-O/08), 3 June 2008; AG/Res. 2595 (XL-O/10), 12 July 2010; AG/Res. 2509 (XXXIX-O/09), 4 June 2009.

¹⁸⁵ IACCommHR, *Lucio Parada Cea et al. v. El Salvador*, Case 10.480, Report N° 1/99; Third Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/V/II, 110, no. 52, Ch.III.

¹⁸⁶ PACE, *Resolution 1463 (2005) on Enforced Disappearances*, 3 October 2005, 1463 (2005), available at: <http://www.refworld.org/docid/43f5d47b4.html>, para. 10.2, in combination with paras. 10.3.8 and 10.5.2.1.

Admittedly, the borders of these two figures – the obligation to investigate and the right to the truth – often blur and overlap; and this makes it difficult to understand the precise correlation between them. Considering the continuous oscillation of reasoning and rationales in official documents, however, an effort of rationalizing the different approaches does not seem relevant for our investigation. Indeed, the deep uncertainty and confusion that characterize the conceptualization of the right to the truth in international documents does not in any way diminish the evident connection between truth and investigations. Regardless of how the relation between the obligation to investigate and the right to truth has been understood, and in spite of the specific legal foundation of the latter, these two legal items are clearly two sides of the same coin. The duties which fall to states on account of the right to truth therefore contribute to delineating the content of the obligation to investigate.

One of the most relevant aspects of the right to truth, which is common to its different conceptualizations, is its dual dimension. On the one hand, the right to the truth is an individual entitlement, owed to victims or their family members, to seek and obtain information about human rights abuses that led to their victimization. On the other hand, the right to the truth is a collective expectation “to know what has happened, generically or specifically, during a certain period of collective history”¹⁸⁷ that is to be protected in the interest of the whole society. These two dimensions clearly influence the concrete content of the duty to investigate which stems from the right to the truth. In the individual dimension, the right to the truth is conceived as the individual right “to have the relevant State authorities to find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution”,¹⁸⁸ whereas the satisfaction of the collective dimension “requires the procedural determination of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their

¹⁸⁷ IACtHR, *Case of Bámaca-Velásquez v. Guatemala*, Separate Concurring Opinion of Judge Sergio García-Ramírez, para. 19.

¹⁸⁸ IACtHR, *Case of Blanco-Romero et al v. Venezuela*. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138, para. 62., Similarly, *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; *Case of González et al. ('Cotton Field') v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, paras. 360 – 370; *Case of the 'Las Dos Erres' Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 105.

corresponding responsibilities”.¹⁸⁹ Whilst the remedial rationale underpins the former dimension, the latter content, which is clearly broader than the individual facet, explains the preventive rationale of the norm. Investigations for the sake of the society are owed in order to ensure the prevention of future repetition. “[K]nowing the truth makes it easier for (the) society to look for other ways to prevent such kinds of violations in the future”.¹⁹⁰ While the satisfaction of the individual right of victims may be achieved through administrative or criminal proceedings, the collective dimension of the right to truth imposes the duty to implement wide-ranging mechanisms of fact finding and historical inquiries on states.

2.1.4 Right to reparation

As described through the previous analysis, investigation processes are grounded on different legal bases and pursue various political and legal aims. Yet, the outcomes of these processes have also been understood as a means of satisfaction for victims, and a mechanism for preserving the historical memory of the society. While, under the label of the right to an effective remedy, investigations have been mainly understood as an instrumental, procedural means to ensure that victims may raise substantial legal claims, within the framework of reparations they are seen as a value itself.

The remedial aspect of investigation lies in its symbolic dimensions: acknowledgment and recognition. When finding a violation through official inquiry mechanisms, a state recognizes the individual as a victim of abuse. In this way, recognition restores the right violated in the sense that it re-establishes the dignity of the victim by publicly acknowledging his or her suffering. At the same time, bringing the causes and mechanisms of violence to light may enable societies to better read and understand patterns of human rights abuses, and, hopefully, avoid their repetition in the future. The contribution of these elements to the process of memory-elaboration is therefore straightforward.

Instruments of soft law that spell out the content of the right to reparations in the case of serious human rights violations embrace investigations as one of the measures to respect the principle of integral redress for the harm. This conceptualization is probably explicated most

¹⁸⁹ IACtHR, *Case Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 192.

¹⁹⁰ IACtHR, *Case of Blanco-Romero et al v. Venezuela*, para. 95.

in the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁹¹ which will be examined further in the chapter on reparations.¹⁹² In the text, forms of inquiries are contemplated within the broad category of satisfaction, which may include:

Verification of the facts and full and public disclosure of the truth (...);

The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(...)

Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.¹⁹³

Although the Basic Principles “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations”, they can be understood as indicative of emerging tendencies in the field of victims’ rights.¹⁹⁴ Moreover, the Principles have provided guidelines and indications that have influenced the way in which reparation measures have been framed and implemented in state practice and judicial decisions in cases of the most serious violations.

In the human rights practice, once again, it was the Inter-American Court of Human Rights that first conceptualized investigations as a means of reparation. Until the middle of the nineties, the Court had considered the violation of the state duty to make appropriate inquiries about the abuses of conventional rights as a primary violation of substantive rights and guarantees. In fact, aspects related to investigations were usually addressed in the merits of the judgments.¹⁹⁵ Nevertheless, since *El Amparo Case*, the Court begun to address investigations

¹⁹¹ *UN Basic Principles on Reparations*.

¹⁹² *Infra*, Ch. V.

¹⁹³ *Ibid.*, Principle 22.

¹⁹⁴ *Ibid.*, preamble para. 7.

¹⁹⁵ See previous paragraphs: investigation as effective remedy, para.2.1.2; investigation as a form of general protection of rights. para.2.1.1; and investigation as part of the right to truth, para.2.1.3.

also as a form of victims' redress. For this reason, orders prescribing investigations were included in the part of the decisions devoted to reparations.¹⁹⁶

In spite of this formal change in the structural conceptualization of the duty to investigate, however, for many years the Court continued to justify the state obligation to conduct investigations on the basis of primary rights. The right of victims and their next of kin to know the truth about what happened; the right to access to effective remedy; the duty to prevent impunity; and the general obligation to ensure rights were the legal grounds supporting the Court's orders to effectively inquire into the abuses. As we saw in the previous analysis, the Court framed the duty to investigate as an independent, secondary obligation stemming from the violation of primary rights, parallel to, and distinct from the legal basis of the obligation to provide reparations for victims (Article 63 ACHR). Continuously and consistently, the Court has affirmed that "whenever there has been a human rights violation, the State has a duty to investigate the facts and to punish those responsible, (...) and this obligation must be complied with seriously and not as a mere formality".¹⁹⁷ Yet, the inclusion of the duty to investigate in the broad universe of reparations has become increasingly resolute.

Further developments of the conceptualization of the duty to investigate as a form of reparation were elaborated in the *Myrna Mack Chang case*.¹⁹⁸ In that judgment, the Court seems to distinguish between the duty to investigate, emerging as a consequence of the infringement of substantive primary rights, and the secondary obligation to conduct inquiries as a form of redress for victims. In this second perspective, investigations are strictly entwined with the right to truth. The Court conceptualized the right of victims to get to know what happened to them and to their next of kin as an "important means of reparation" in itself.

¹⁹⁶ IACtHR, *Case of El Amparo v. Venezuela*. Reparations and Costs. Order of the Court of April 16, 1997. Series C No. 46, para. 61.

¹⁹⁷ Ibid., para 61; See also *Case of "Street Children" (Villagrán Morales y otros) Vs. Guatemala*. Reparations, para. 100; *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 69; and *Case of Cesti Hurtado v. Peru. Reparations and Costs*. Judgment of May 31, 2001. Series C No. 78, para. 62.

¹⁹⁸ IACtHR, *Case of Myrna Mack Chang Vs. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101.

States must undertake effective investigations to satisfy that need to know, and – in so doing - to restore the dignity of victims and their family, especially in contexts of general impunity.

Since *Myrna Mack Chang*, the Court has developed the remedial nature of the obligation to investigate on two levels, as an instrument of satisfaction for the individual victim (or their next of kin) and as a guarantee of non-repetition for the whole society. At the root of its reasoning, it lies, once again, the fight against impunity.¹⁹⁹ For the Court, the lack of investigation into the facts “constitutes a source of additional suffering and anguish for the victims”,²⁰⁰ and at the same time contributes to feeding the general pattern of impunity for perpetrators, and thereby of insecurity for the society. This construction of the duty to investigate mirrors the above-mentioned dual nature of the right to know the truth, which strictly entwines with it. As a matter of fact, in the Court’s words, “not only the next of kin of the victims, but also society as a whole” benefit from investigations, since “by knowing the truth about such crimes, it can prevent them in the future”.²⁰¹

In its jurisprudence, the duty to investigate has become one of the most commonly issued forms of reparation to “completely redress” the infringements of the victims’ right to truth.²⁰² And indeed the Court has continuously monitored the state compliance with investigative processes after its judgments in the same way it does with the other measures of reparations ordered.²⁰³ Although the Court’s understanding of the right to truth as a mechanism of redress leaves room for doubts and confusion, the relation the Court establishes between the legitimate expectation of victims and society to know the facts and the consequent obligation of the state to conduct investigations as a remedial measure, both at the individual and collective level, seems remarkable.

2.1.5 Rationalizing the duty to investigate

In the previous sections of this chapter, the duty to investigate has been explored according to the legal justifications used by international and regional human rights bodies.

¹⁹⁹ This *dictum* was frequently reiterated by the Court in several judgments. See, e.g. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Judgment of November 19, 2004. Series C No. 116., paras. 95-97; *Case of Tibi v. Ecuador*, para. 255; *Case of the Gómez Paquiyauri Brothers v. Peru*, para. 228, and *Case of the 19 Merchants v. Colombia*., paras. 257 and 260.

²⁰⁰ IACtHR, *Case of González et al. ('Cotton Field') v. Mexico*, para. 454.

²⁰¹ IACtHR, *Case of the 19 Merchants v. Colombia*, para. 259.

²⁰² *Ibid*, para. 275.

²⁰³ *Ibid*, para. 274.

The analysis of the different legal bases of the duty to investigate was not merely a doctrinal exercise. Actually, for the purposes of our inquiry, inferring the duty to investigate from one or another title is relevant for the actual content of the kind of inquiries states are to make. In each of the corresponding sections, some considerations have already been advanced. It is useful to recall them here, and put them in connection with each other.

The rationale behind each normative ground affects the ways in which investigations must be carried out in order to discharge the corresponding state obligation. So, as has been noted, when investigations are sought as a remedy for victims, the ‘amount of truth’ that should be investigated is such that it effectively allows the victim to pursue redress for his or her harm. This could mean that, if the victim can achieve a remedy through alternative measures, the state, in theory, may even refrain from clarifying the facts.²⁰⁴ When investigations aim at preventing future patterns of mass human rights violations, on the contrary, public scrutiny and the eventual punishment of those responsible come to play a crucial role in accomplishing the deterrent task. The preventative rationale, moreover, entails that investigations are carried out in an extensive and comprehensive way; this means that states are expected, through investigations, to shed light on the whole system of illegality – and not only on the specific violations, so as to reveal structural frameworks of legal uncertainty and impunity in order to avoid future abuses. Public scrutiny also seems to be crucial when investigations are conducted to provide some form of satisfaction to the victims. In that case, location of the bodies, disclosure of mass graves, and official, public gestures enhance the effects of the remedial power of investigations. Moreover, when investigations are required to ensure the right to truth, the scope of the duty to investigate extends to providing not only a verification of the facts, but also an explanation for them. In particular, the dual dimension of the right to know the truth – individual and collective – entails that investigations should be conducted not only to uncover the facts that led to the victimization of individuals, but also to allow the society to get to know “general information regarding patterns of systematic violations, the history of the conflict and the identifications of those

²⁰⁴ As has been noted above, this is not the case of the Inter-American system, in which the jurisprudence of the IACtHR has developed a proper individual right to have violations investigated. See *supra*, para. 2.1.2.

responsible”.²⁰⁵ This is not to say that investigations actually differ in their objective or outcome according to the legal justification they are based upon, but that the rationale behind them influences the viewpoint from which investigations are conducted, first, and assessed, second. As a consequence, each investigation uncovers and preserves partial records, specific views of the whole historical account, according to the specific rationale it is based upon.

2.2 Standards

If we agree with the assertion that investigations are one of the preconditions for the creation of a collective memory, as they offer the factual basis from which the process of memory-elaboration might start, we have to recognize that the way investigations are implemented in practice has a strong impact on the content of the collective memory of society. In fact, if investigations are biased, politically distorted, or even just incomplete, the historical narratives they tell will be equally incomplete, distorted, and biased. As a result, the memory built upon those historical accounts will differ accordingly. Conversely, a full, impartial, and effective investigation will provide the society with the broad picture of the traumatic event on the basis of which it can negotiate and shape its memory. International human rights law can impact on the modalities of fact finding mechanisms by imposing specific standards on states which have to be met for the duty to investigate to be fully discharged. If we understand the investigative modalities and mechanisms which are required in international *fora*, hence, we can better understand how the duty to investigate may influence the way states read and represent the grave abuses committed in the past. Thus, it is relevant for our research to analyse the standards that international and regional human rights bodies have set over the years on *how* to investigate and *what* to investigate.

There is wide-spread consensus on that there exists not one standard form for carrying out investigations. A case by case approach, which takes into account the context and the circumstances of each specific situation, is the only possible way to tackle the issue.²⁰⁶ However, the case law of the main international human rights bodies widely converges on the general criteria investigations should meet. According to the jurisprudence of the three institutions considered above in this chapter – the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights –, investigations

²⁰⁵ *Chicago Principles*, p. 24.

²⁰⁶ ECtHR, *Velikova v. Bulgaria*, App. No. 41488/98. Judgment of 18 May 2000, para. 80.

should be carried out *ex officio*, i.e. regardless of the victims or their next of kin being able to require the state to initiate them on their own initiative (“the responsibility for investigations falls under the State party's obligation to grant an effective remedy”),²⁰⁷ while at the same time it should allow victims and their next of kin to have access to the proceedings.²⁰⁸ Furthermore, it should be guided by a competent authority,²⁰⁹ in an impartial and independent way (especially in the case of abuses committed by state officials, for whose disclosure independent investigative bodies have been required);²¹⁰ it should be prompt and effective –²¹¹ meaning that it should not be “theoretical and illusory”;²¹² it has to be conducted with the due diligence, proportional to the seriousness and gravity of the violations;²¹³ and in good faith.²¹⁴ The results of the investigations should be transparent and made public.²¹⁵ Overall, the

²⁰⁷ HRC, *Rodríguez v. Uruguay*, para. 12.3 and para. 6.3; ECtHR [GC], *Nachova and Others v. Bulgaria*, App. No. 43577/98. Judgment of 06 July 2005, para. 111; IACtHR, *Case of Espinoza Gonzáles v. Peru*, para. 238.

²⁰⁸ ECtHR, *Anguelova v. Bulgaria*, App. No. 38361/97. Judgment of 13 June 2002, para. 140; *Ramsahai and Others v. The Netherlands*, App. No. 52391/99. Judgment of 15 May 2007, para. 354; *Association "21 December 1989" and Others v. Romania*, para. 135.

²⁰⁹ HRC, *General Comment No. 20*, para. 14; *Blanco v. Nicaragua*, Comm. No 328/1988, para. 10.6.

²¹⁰ ECtHR, *Ramsahai and Others v. The Netherlands*, para. 325, 333-341; *Association "21 December 1989" and Others v. Romania*, para. 133; IACtHR, *Case of Anzualdo-Castro v. Peru*. Preliminary Objection, Merits, Reparations and costs. Judgment of September 22, 2009. Series C No. 202, para. 62; *Case of Human Rights Defender et al. v. Guatemala*, para. 200; HRC, *Concluding Observations on Cambodia*, 27 July 1999, UN Doc. CCPR/C/79/Add.10, para. 10.

²¹¹ ECtHR [GC], *Çakıcı v. Turkey*, para. 104; *Isayeva and Others v. Russia*, App. No. 57950/00. Judgment of 24 February 2005, para. 213; *Association "21 December 1989" and Others v. Romania*, para. 133-134; *Kaya v. Turkey* (1998), para. 107; HRC, *Blanco v. Nicaragua*, para. 10.6. (1994). Similarly, in the wording of the IACtHR, investigation should be conducted “in a serious manner, not as a mere formality”, *Velásquez Rodríguez Case*, para. 177; *Case of Las Palmeras v. Colombia*. Merits. Judgment of 6 December 2001. Series C No. 90, para. 58; HRC, *General Comment No. 31*, para. 15.

²¹² ECtHR, *Airey v. Ireland*, App. No. 6289/73. Judgment of 9 October 1979, para. 24 and, more recently, *Gray v. Germany*, para. 82; IACtHR, *Las Palmeras v. Colombia*, para. 58.

²¹³ IACtHR, *Velásquez Rodríguez Case*, Merits, para. 177; *Masacre de La Rochela Vs. Colombia*. Judgment of the 11 May 2007. Serie C No. 163, para. 149; ECtHR, *Association "21 December 1989" and Others v. Romania*, para. 132; HRC, *Concluding Observations on Colombia*, para. 9.

²¹⁴ HRC, *Valenzuela v. Peru*, Comm. No. 309/1988, 14 July 1993, UN Doc. CCPR/C/48/D/309/1988, para. 6.1; Similar requirements of diligence, good faith, impartiality and effectiveness have been put forth by the Inter-American Commission of Human Rights. See, e.g., IACommHR, *Arnulfo Romero and Galdamez v. El Salvador*, Case 11.481, Report N° 37/00, 13 April 2000, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671 (1999), 13 April 2000, para 80.

²¹⁵ HRC, *Comments on Tunisia*, 23 November 1994, UN Doc. CCPR/C/79/Add.43, para. 14; ECtHR, *Kelly and Others v. The United Kingdom*, App. No. 30054/96. Judgment of 4 May 2001, paras. 98; 136-138; *Anguelova v. Bulgaria*, App. No. 38361/97. Judgment of 13 June 2002, para 140; [GC], *Ramsahai v. The*

duty to investigate is an obligation of means, not of result.²¹⁶ Yet, it should be at least “adequate”, that is, capable of leading to the identification, prosecution, and, be it appropriate, conviction and punishment of perpetrators.²¹⁷ Interestingly, the duty to investigate is understood as non-delegable to third parties, therefore external fact-finding reports – such as the ones put forward by NGOs – are not considered a form of compliance to the duty.²¹⁸

The *Guidelines* of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, while clearly geographically limited and non-binding in nature, effectively summarize and explain the content of these general principles.²¹⁹ According to the document, in order for an investigation to be effective, it should be: i) *Adequate*, “capable of leading to the identification and punishment of those responsible. This does not create an obligation on states to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident”; ii) *Thorough*, “comprehensive in scope and address[ing] all of the relevant background circumstances, including any racist or other discriminatory motivation. It should be capable of identifying any systematic failures that led to the violation”; iii) *Impartial and independent*, “authorities who are implicated in the events can neither lead the taking of evidence nor the preliminary investigation; in particular, the investigators cannot be part of the same unit as the officials who are the subject of the investigation”; iv) *Prompt*, “commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. (...) The investigation must be completed within a reasonable time and, in all cases, be conducted with all necessary diligence”; v) *Subjected to public scrutiny*, “to secure accountability, to maintain public confidence in the authorities’ adherence to the rule of law and to prevent any appearance of collusion in or

Netherlands, App. No. 52391/99. Judgment of 15 May 2007, paras. 321; 353-354; IACtHR, *Bámaca Velásquez v. Guatemala*, Merits. Op. para. 8; Reparations and Costs, Judgment of 22 February 2002. Serie C No. 91, para. 78.

²¹⁶ ECtHR, *Gray v. Germany*, para. 93; IACtHR, *Case of Espinoza González v. Peru*, para. 238.

²¹⁷ ECtHR [GC], *Ramsahai v. Netherlands*, para. 324; *Kaya v. Turkey* (1998), para. 107; IACtHR, *Case of Human Rights Defender et al. v. Guatemala*, para. 202; HRC, *José Vicenté et al. v. Colombia*. Comm. No. 612/1995, 14 June 1994, UN. Doc. CCPR/C/60/D/612/1995, para. 8.8.; *Abubakar Amirov v. Russian Federation*, Comm. No. 1447/2006, 22 Apr 2009, UN. Doc. CCPR/C/95/D/1447/2006, paras. 10.4, 11.2.

²¹⁸ IACommHR, *Arnulfo Romero and Galdámez v. El Salvador*, paras. 139; 150. See also *infra*, on the role of truth commissions in discharging the state’s obligation to investigate, para. 3.1; ECtHR, *Janowiec and Others v. Russia*, para. 143.

²¹⁹ CoE, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011, VI.

tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties.”²²⁰ Similarly, the *Minnesota Protocol* – indicating principles on the effective investigation of extrajudicial killings –, and the *Istanbul Protocol* – on the effective investigations of torture and other cruel, inhuman, or degrading treatment –, reaffirm the same minimum standards, while adding a thorough indication on how to collect, analyse, and assess all documentary, physical, and medical evidence and witnesses’ statements.²²¹ Courts have applied these soft law instruments in human rights litigation.²²²

Moreover, taking mostly from the practice on enforced disappearance, judicial and quasi-judicial bodies have spelled out good practice in the carrying out of investigations, which has been used as criteria for evaluating the effectiveness of the inquiring processes. The Working Group on Enforced or Involuntary Disappearances (WG EID), in its *Comment on the Right to the Truth*, asked of states that the process of investigation and identification of bodies be rigorously and scientifically carried out through valid and reliable techniques and methods.²²³ As a result, many states implemented specific policies and pieces of legislation, in order to regulate the process of disclosure of the bodies.²²⁴ Brazil, for instance, established an inquiry commission and an inter-ministerial committee, whose aim was to locate and identify the remains of those who disappeared during the period of dictatorship.²²⁵ Argentina created the Argentine Forensic Anthropology Team, a scientific team of expert anthropologists that cooperates with both the government and courts to discover the fate of missing persons. Both countries, moreover, established databases of genetic data and biological samples in order to

²²⁰ Ibid.

²²¹ UN DoPA, *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, (“Minnesota Protocol”). UN Doc. E/ST/CSDHA/12 (1991). Annex I, available at: <http://www.unrol.org/doc.aspx?d=2757>. OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Istanbul Protocol”), 2004. UN Doc. HR/P/PT/8/Rev.1, available at: <http://www.refworld.org/docid/4638aca62.html>.

²²² See, for instance, the jurisprudence of the IACtHR, which has applied the *Minnesota Protocol* for deciding on the effectiveness of state investigations. *Case of González et al. (‘Cotton Field’) v. Mexico*, para. 301; 318; *Case of ‘Las Dos Erres’ Massacre v. Guatemala*, para. 248, fn. 259.

²²³ UN WGEID, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*.

²²⁴ HRCouncil, *Right to the Truth*, A/HRC/5/7.

²²⁵ Brazil, Law No. 10.875/2004 of 24 March 2004; and Law No. 4.850/2003 of October 2003.

facilitate the process of identification by comparison of missing people and human remains.²²⁶ Similar initiatives were also established in the Philippines and Ireland.²²⁷ At the international level, finally, the International Commission on Missing Persons was created with the aim of fostering the process of locating and identifying disappeared people in the context of the conflict in the former Yugoslavia, thereby enabling governments to implement and protect the right to know of the victims' relatives.²²⁸ Stepping outside the specific domain of enforced disappearance, these criteria have progressively influenced the jurisprudence of human rights bodies on the general issue of investigations of gross and systematic human rights and humanitarian law violations.²²⁹ Forensic and anthropologic analyses, scientific methods of preservation and records of evidence, clinical evidence and autopsies carried out according to international standards are nowadays demanded by courts when assessing the effectiveness of investigations undertaken by responsible states.²³⁰

In sum, on the basis of these general standards, international human rights law requires that investigation to be timely, broad, accurate, effective, and objective. It also specifically determines modalities and criteria for investigations to be conducted. Moreover, in the case of gross violations of human rights, statutes of limitations, time-bar provisions, and any other measures aimed at waiving responsibility have been considered at odds with the main human rights provisions, as they prevent the possibility of looking into the abuses.²³¹ Now that the general guidance given by human rights bodies has been spelled out, we should turn to observing how they impact on the specific modalities that governments have implemented to

²²⁶ Argentina, Act No. 25.457 of 1992, and Act No. 23.511 of 1987. The establishment of genetic databases as a means of ensuring effective investigations has also been ordered increasingly by the IACtHR in a number of recent judgments as a form of reparation for victims. See, e.g.: *Case of González et al. ('Cotton Field') v. Mexico*, para. 512; *Case of 'Las Dos Erres' Massacre v. Guatemala*, paras. 247-248.

²²⁷ HRCouncil, *Right to the Truth*, A/HRC/5/7, paras. 48, 50-51.

²²⁸ The International Commission on Missing People was initially established in 1996, during the G-7 Summit in Lyon (France), at the initiative of the U.S. Its legal status, mission and functioning were further clarified by the intergovernmental "*Agreement on the Status and Functions of the ICMP*" signed by the State Parties on the 15 December 2014, available at: <http://www.ic-mp.org>.

²²⁹ HRC, Resolution 10/26: Forensic genetics and human rights, 27 March 2009, UN. Doc. A/HRC/RES/10/26.

²³⁰ See, for instance, ECtHR, *Bazorkina v. Russia*, App. No. 69481/01. Judgment of 27 July 2006, para. 118. IACtHR, *Case of Ibsen Cárdenas and Ibsen-Peña v. Bolivia*. Merits, Reparation and Costs. Judgment of September 1, 2010. Series C No. 217, paras. 219; 223-225; *Case of González et al. ('Cotton Field') v. Mexico*, para. 512. Interestingly, as mentioned above, the IACtHR applies the standards elaborated in the *Minnesota Protocol*.

²³¹ See, for instance, IACtHR, *Case of La Rochela*, paras. 292-294. For a similar case, although not leading to a compelling legal obligation, see ECtHR, *Janowiec and Others v. Russia*, para. 152.

fulfil the duty to investigate, and how those modalities have been addressed by human rights bodies.

3. Implementing the Duty to Ascertain the Truth - Modalities for Investigations

In principle, states enjoy wide discretion in the choice of the mechanisms to be used in ascertaining the facts. Indeed, attempts made to pierce the veil of impunity and to uncover the traumatic events of the past abuses by states emerging from periods of mass violations of human rights have resulted in a varied collection of mechanisms of inquiry and accountability that has been at the centre of the scholarly debate on transitional justice.²³² All these mechanisms, regardless of their structure, have been instituted in order to “accumulate, synthesize, and interpret individual memories so as to offer society as a whole an official interpretation of its shared past”.²³³ The challenge for emerging governments is to strike the balance between the different goals of a transition to democracy. Uncovering the truth, while promoting reconciliation; securing accountability for perpetrators, while re-establishing the functioning of the administrative and judicial machinery of the state; redressing victims’ suffering, while sewing the deep wounds shut in the social fabric; and so on. While the quest for an official clarification of the facts is often the primary reason that induces states to create such mechanisms, additional expectations from the society and political goals may determine the form they take.

Prosecution and social reconciliation are usually the two main features that differentiate the physiognomy of these institutional designs in the traditional dichotomy between prosecutorial and non-prosecutorial options. The choice that is made between these

²³² On the ‘truth versus justice dilemma’, see *inter alia* Rotberg, R.I. and Thompson, D., eds, *Truth v. justice: the morality of truth commissions* (Princeton, N.J.: Princeton University Press, 2000); Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998); Goldstone, R.J., “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals”, *New York University Journal of International Law and Politics* 28 (1996): 485-502; Levitt, J., “Developments in the Law - International Criminal Law (Pt. 2): The Promises of International Prosecution”, *Harvard Law Review* 114, no. 7 (2001): 1957-1982; Schabas, W., “The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone”, *Human Rights Quarterly* 25, no. 4, (2003):1035-1066; Roht-Arriaza, N., “The new landscape of transitional justice”, in *Transitional justice in the twenty-first century: beyond truth versus justice*, eds. Roht-Arriaza, N. and Mariezcurrena, J. (Cambridge, UK; New York: Cambridge University Press, 2006), 1-16.

²³³ Lanegran, K., “Truth Commissions, Human Rights Trials, and the Politics of memory.” *Comparative Studies of South Asia, Africa and the Middle East* 25 no. 1, (2005): 111, quoted by Lessa, *Memory and Transitional Justice*, 22.

two options for assessing the history of past atrocities holds important consequences for the narrative which is eventually told and conveyed to the society. Carlos Nino, in a quote reported by Mark Osiel, affirmed that

the public presentation of the truth is much more dramatic when done through a trial, with the accused contributing to the development of the story. Furthermore, the quality of narration in an adversarial trial can not be fully replicated by other means. Even when an amnesty or pardons are issued at the end of a trial, they do not counteract the initial effect of such emphatic public disclosure.²³⁴

In consideration thereof, in the following sections, I observe two of the most common legal responses for dealing with the legacy of their past used by governments in the aftermath of mass atrocities: judicial mechanisms and truth commissions.

3.1 Judicial investigations

*“[A trial] is a venue for seeking the victory of the memory of justice over the will to forget”*²³⁵

Not *all* human rights abuses are to be ascertained through criminal investigations. Alternative forms of inquiry, such as administrative or civil proceedings, or *ad hoc* commissions can generally absolve the state from the duty to investigate as well.²³⁶ However, in cases of the most serious violations, the judicial way is generally required. As we have seen above in the case law of the main human rights bodies, they all tend to order states to carry out official investigations through appropriate judicial proceedings and to condemn them when they fail to do so effectively. We noticed this trend above, in the repeatedly used wording of the ECtHR which exhorts states to “conduct investigations capable of leading to the identification and punishment of those responsible”.²³⁷ From this *dictum*, we can infer that, while identification and punishment are not conditions of an effective investigation (as it is an obligation of means, but not of result, as said above), the inquiring proceeding should be a judicial one, able to *potentially* lead to the prosecution and sanctioning of the perpetrators.

²³⁴ Quotation in Osiel, M., “Ever Again: Legal Remembrance of Administrative Massacre”, *University of Pennsylvania Law Review* 144, no. 2 (December 1995): 463. While Osiel refers to the original unpublished manuscript, the quotation does not appear in the published version of the book. Nino, C., *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

²³⁵ Booth, “The Unforgotten”, 779.

²³⁶ In this sense, for instance, ECtHR, *Gray v. Germany*, para. 81.

²³⁷ See, *inter alia*, ECtHR, *Ilhan v. Turkey*, para. 61; 92; 97; *Kaya v. Turkey* (1998), para. 107; *Yaşa v. Turkey*, cit., para. 114; *Assenov v. Bulgaria*, para. 102.

The Court has made this explicit, for instance in the recent decision on the case of *Janowiec*, in which it was called to adjudicate on the responsibility of Russia for the lack of investigations into the famous, tragic Katyn massacre of 1940. In that decision, the Court indicated “criminal, civil, administrative or disciplinary proceedings”, whilst excluding those inquiries established for the purpose of clarifying a historical truth, such as truth commissions.²³⁸ In choosing from among the different kinds of proceedings, moreover, states are not completely free from interference. The Court in fact stipulates that their nature be proportionate to the ultimate goal of identifying and punishing those responsible, and compensating victims. In *Ayder v. Turkey*, for instance, the Court deemed the administrative proceedings put in place by the state inadequate and inefficient for the determination of the responsibility of the members of security forces for the injurious acts. The case related to the destruction of properties by security forces in Turkey. By denying the legitimacy of the administrative proceedings of investigating the alleged violations carried out by the states, the Court implied that, in order to identify those responsible, criminal proceedings were necessary in that case.²³⁹

Judicial proceedings have been considered the primary avenue for investigations also by the IACtHR. In the cases in which the establishment of truth commissions was indicated as proof of its compliance with the obligation to investigate by the state, the Court, while welcoming the efforts of historical and truth commissions in the fact-finding processes, has repeatedly considered them insufficient to meet the requirements necessary for discharging the obligation to conduct investigations through judicial proceedings.²⁴⁰ In point of fact, in the case of the denial of justice for the extrajudicial execution of a Chilean citizen, Mr Almonacid-Arellano, by the Chilean authorities, the Court remarked that

²³⁸ ECtHR, *Janowiec and Others v. Russia*, para. 143.

²³⁹ ECtHR, *Ayder and Others v. Turkey*, App. No. 23656/94. Judgment of 8 January 2004, para. 98. Similarly the HRC expressed the view that in the case of particularly serious offences, merely administrative or disciplinary proceedings cannot be considered adequate or effective remedies; consequently, the judicial avenue is thus required in these cases. See e.g. HRC, *José Vincente et al. v. Colombia* para. 5.2.

²⁴⁰ On the relationship between truth commissions and judicial mechanisms of accountability, see, in particular, IACtHR, *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, paras. 127-129. See also *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219, para. 297; *Chitay Nech v. Guatemala*, para. 234; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, para 158.

the “historical truth” included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano’s death, attribute responsibilities, and punish all those who turn out to be participants.²⁴¹

Accordingly, while it is still debated whether criminal prosecution and punishment of perpetrators are affirmative state obligations under international law,²⁴² it is certain that international law calls for international crimes at least being criminalized under domestic law, and for effective judicial machinery being implemented to guarantee the clarification and disclosure of facts at the very least.

Indeed, criminal justice is one of the most common instruments through which old and new democracies comply with their duty to investigate mass crimes, through which they deal – or are blamed not to deal – with the accountability for past abuses, assessing individual responsibility. However, the use of criminal measures as a primary source for the clarification of the facts can be problematic. The limits and rules that regulate criminal inquiries might determine their outcome. The assessment of the evidence is completed to ascertain the individual responsibility of the perpetrators, while testimonies and individual narratives are heard insofar they are functional to that aim. The focus is on the perpetrators, and the social and historical context of the violence that surrounded the specific crimes are considered only to the extent to which they are necessary to contribute to hold those responsible accountable.²⁴³ The Prosecutor of the ICTY, Carla Del Ponte, in addressing the role of the

²⁴¹ IACtHR, *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 150. In this same case and in subsequent jurisprudence, the Court repeated that truth commissions, although valuable and desirable, do “not substitute or complete the State’s obligation to also establish the truth through court proceedings”. See, e.g., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para 224; See also *Case of Human Rights Defender et al. v. Guatemala*, para. 202.

²⁴² See, among others, Seibert-Fohr, *Prosecuting Serious Human Rights Abuses*; Mallinder, L., “Can Amnesties and International Justice be Reconciled?” *International Journal of Transitional Justice* 1 (2007): 208–230; Orentlicher, “Settling Accounts Revisited”; Roht-Arriaza, N. “State responsibility to investigate and prosecute grave human rights violations in international law” *California Law Review* 78, no. 2 (1990): 451-513.

²⁴³ On the limits of criminal justice in writing history see, among others, Drumbl, M., *Atrocities, Punishment, and International Law*, (Cambridge; New York: Cambridge University Press, 2007), 151-154; Osiel, *Mass Atrocity, Collective Memory, and the Law*; Wilson, *Writing history in international criminal trials*.

Tribunal in front of the Security Council, remarked that “our task is not to prepare a complete list of war casualties. Our primary task is to gather evidence relevant to criminal charges”.²⁴⁴

Especially in the case of wide-spread patterns of structural violence and systematic violations to fundamental human rights, the accounts resulting from criminal inquiries are not necessarily representative of the full picture of the complex network of social and political forces, and individual dynamics and stories, which led to those situations. It would not even be fair to expect criminal inquiries to perform and satisfy an historical clarification mission. Moreover, the issue of time is crucial in assessing the role of trials in judging history through placing criminal responsibilities. Osiel correctly observes that courts, normally operating in the immediate aftermaths of crimes, lack historical hindsight. The passing of time is essential in order that a broader historical reflection may develop in which the events can be carefully placed and assessed. Yet, for trials to be effective and to ensure a fair process, appropriate timing should be ensured, as not to create too much temporal distance from when the crimes happened.²⁴⁵

The limits of criminal proceedings in judging the history of mass atrocities are well reflected in the words of the General Attorney in the *Eichmann case* before the Israeli Supreme Court. With those words, he modestly, but honestly, acknowledged and recognized the scope and limits of a criminal trial in judging unthinkable atrocities.

The desire was felt – readily understandable in itself- to give, within the limits of this trial, a comprehensive and exhaustive historical account of the events of the catastrophe, and, in so doing, to emphasize also the signal feats of heroism of the Ghetto-fighters (...) Others again sought to regard this trial as a forum to clarify questions of great import (...)

[But] the Court (...) must not allow itself to be enticed to stray into provinces which are outside its sphere. The judicial process has ways of its own (...) whatever the subject-matter of the trial. Were it not so, (...) the trial would otherwise resemble a rudderless ship tossed about on the waves.

(...) The Court does not possess the facilities required for investigating general questions of the kind referred to above. For example, to describe the historical background of the catastrophe, a great mass of documents and evidence had

²⁴⁴ Statement of the Prosecutor of the ICTY, Carla del Ponte, during the 54th Session of the 4063 Security Council meeting , 10th November 1999. In *Yearbook of the International Criminal Tribunal for the Former Yugoslavia*, UN. Publications, 1999.

²⁴⁵ Osiel, *Mass Atrocity, Collective Memory, and the Law*, 215-217.

been submitted to us, collected most painstakingly and certainly out of a genuine desire to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of the extant sources on the subject (...) As for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on the carries no greater weight than that of any person who has devoted study and thought to these questions.²⁴⁶

Yet, does the General Attorney's statement in the *Eichmann* really correspond to the actual state of the art on the role of criminal trials in writing history? Indeed, the boom of international criminal tribunals, the demand made at the international level for prosecution of perpetrators of mass crimes, and the consequent development of the branch of international criminal law, have further expanded the role of criminal justice in the process of writing the history of mass crimes through law. Different theories of punishment underpin the deployment of the criminal machinery. Retributive justice theory highlights the value of punishment itself as an instrument to maintain the legal order. The preventionist approach stresses the deterrent effect of criminal trials. Restorative theory understands punishment as a tool for offering victims a certain degree of satisfaction for the injuries suffered. Expressivists, finally, recognize in criminal prosecution a means of serving the rule of law, embracing a number of subordinated functions to achieve that final goal. All these dimensions come to fore when criminal mechanisms are called to shed light on patterns of mass and systematic violence.

In relation to the Eichmann process, Hannah Arendt famously claimed: "The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes – 'the making of a record of the Hitler regime (...)' can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment."²⁴⁷ While this claim, in line with the opinion of the Israeli Supreme Court in *Eichmann*, in theory may be considered undisputable, *de facto*, the effects that criminal proceedings for mass crimes have on the national processes of coming to terms with the period of violence are – be it desired or not - much more extensive. These go well beyond the purpose of 'render[ing] justice', in Arendtian terms. Despite the fact that the resolutions creating international criminal tribunals declare to establish "international tribunal(s) for the

²⁴⁶ *Attorney General of Israel v. Eichmann*, quoted in Osiel, *Mass Atrocities, Collective Memory, and the Law*, 80-81.

²⁴⁷ Arendt, H., *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1984), 253.

sole purpose of prosecuting”,²⁴⁸ prosecution for international criminal inquiries and trials in fact serve a number of different objectives. The Statute of the Iraqi High Tribunal, for instance, lays down the rationales behind the creation of the Tribunal: i) exposing the crimes committed in Iraq during Saddam’s repressive regime; ii) laying down rules and punishments to condemn perpetrators; iii) forming a specialized Iraqi high criminal court; iii) revealing the truth, and the suffering and injustices; iv) protecting the rights of Iraqis; v) “alleviating injustice”.²⁴⁹

In fact, the main purposes that underpin ‘ordinary’ criminal justice - i.e. the punishment of those responsible and deterrence from future crimes - in cases of mass atrocities may even be undermined by the intrinsic limits of criminal law principles and means. The unaccountable acts of violence and number of individuals potentially involved in the proceedings cannot be fully investigated and assessed by the limited possibilities and resources of the judicial machinery, both at the national and at the international level. The trade-off between seeking justice for all the crimes, and the effort to preserve the effectiveness of the judicial system and the cohesion of the social fabric has often led to choosing the selective policy of punishing only the most responsible ones.²⁵⁰ And perhaps this is why it has been said that “trials involving genocide or crimes against humanity are less about judging a person than about establishing the truth of the events”.²⁵¹

²⁴⁸ UN SC Resolution 827, 25 May 1993. UN Doc. S/RES/827 (1993), Art. 2, available at: <http://www.refworld.org/docid/3b00f21b1c.html> and Resolution 955. 8 November 1994, UN. Doc. S/RES/955 (1994), available at: <http://www.refworld.org/docid/3b00f2742c.html>.

²⁴⁹ Law No. (10)2005: *Statute of the Iraqi High Tribunal*, Official Gazette of the Republic of Iraq, No. 4006, 18 October 2005, (postscript: ‘Justifying Reasons’), discussed by Drumbl, M. “What Historical Narratives Are the Iraqi Trials Developing?”, in *Saddam on Trial*, eds. Scharf, M.P. and Mc Neal, G. (Durham, N.C.: Carolina Academic Press, 2006), 212-215. English translation of the Statute is available *ibid.* Appendix I, 283-302.

²⁵⁰ On the ‘selectivity’ of criminal justice see, among others, Drumbl, *Atrocities, Punishment, and International Law*, 151-154.

²⁵¹ Koskeniemi, “Between Impunity and Show Trials”, 3. See, for instance, the role of the ICJ’s judgment on genocide on the reconstruction of a broad historical pattern of the causalities which brought internal conflict to the Balkan in the Nineties. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment of 26 February 2007. I.C.J. Reports 2007, p. 43 and the recent *Croatia v. Serbia* judgment. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Judgment of 3 February 2015. Available at: <http://www.icj-cij.org>. For an analysis of the impact of the 2007 ICJ’s judgment in the BiH context see, Rosenberg, S., “What’s Law Got To Do With It?: The Bosnia V. Serbia Decision’s Impact On

Indeed, in cases of serious human rights abuses, criminal trials of perpetrators have produced widespread impact, both over the transition of violence-torn societies towards a democratic system, and in the international public opinion and institutional responses, whether or not they were conducted in international or domestic *fora*. There is no need to recall the great social impact of the Argentinean processes against the members of the *Junta Militar* – ‘*los Juicios por la Verdad*’ –, or the flow of reactions that came in response to the Eichmann’s process. The trials of Milosevic, Tadić, Pinochet, and the other proceedings against the symbols of dictatorships and terror, were all followed with great anticipation and concern by the national and the international public. They were perceived as signalling a moral reproach of the atrocities that had been perpetrated and the sufferings that had been inflicted, and as providing closure.²⁵² Criminal trials have become exemplar trials.²⁵³ They have become the public place of blame and shame, a cathartic drama where societies apologize for their sins, where victims satisfy their revenge, and history is written. In these dynamics, the results from criminal proceedings for mass crimes are clearly constructed in a way to impact on the creation of the collective memory of societies.

3.2 Truth Commissions

Besides the foregoing considerations on the role of criminal justice in the cases of widespread and most serious abuses, the landscape of the practice in the domain of transitional justice indicates that the duty to investigate stretches beyond the mere judicial verification of events, asking for mechanisms that allow meaningful and effective inquiries, regardless of the form they take. Whilst the actual scope of this duty undeniably first and foremost has been interpreted as requiring states to establish judicial proceedings, as noted above,²⁵⁴ the shortcomings of judicial-limited approaches to patterns of systematic and widespread violence, together with the development of theoretical reflections in the field of transitional justice, have encouraged both states and international bodies to carefully consider alternative

Reconciliation”, *Rutgers Law Review* 61, no.1 (2008): 101-126. Here, again, we go back to the fraught relationship between judicial truth and historical truth mentioned above.

²⁵² See Wilson, *Writing History in International Criminal Trials*; Geoffrey, R., *Crimes against Humanity : The Struggle for Global Justice*, (London: Penguin Books, 2012).

²⁵³ Koskeniemi talks of “show trials” in this sense. “Between Impunity and Show Trials”, at 35.

²⁵⁴ *Supra*, para. 3.1.

mechanisms of fact finding.²⁵⁵ Among them, truth commissions are certainly the most common, although a few other measures for ascertaining past atrocities have been sporadically experimented with in some countries.²⁵⁶

Their implementation in state practice has been supported by a number of soft law instruments and international resolutions and recommendations, which encouraged governments to set them up, either separately or complementary to jurisdictional means of investigation.²⁵⁷ The above mentioned Set of Principles to Combat Impunity, for instance, includes the creation of fact-finding mechanisms among the measures to guarantee the victims' right to know, and emphasizes the importance of the processes of truth disclosure in healing societies that have experienced periods of mass violence.²⁵⁸ The implementation of truth seeking mechanisms by states has been also favoured and encouraged by the IACtHR. As noted above, while stressing the need for judicial proceedings to fully discharge the state obligation to investigate, the Court has recognized the importance of non-judicial mechanisms

²⁵⁵ The International Centre for Transitional Justice has played an important role in helping governments in democratic transition to come to terms with the legacy of periods of past violence or democracy failure. On various occasions, its officers raised awareness about the limits of a mere criminal justice approach to truth-discovering process. "Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as 'blood money'". ICTJ, at <http://ictj.org>.

²⁵⁶ See, for instance, the experience of the Gacaca Courts and their role in investigating the truth of Rwandan genocides. For a study on these courts, see Fierens, J. "Gacaca Courts: Between Fantasy and Reality", *Journal of International Criminal Justice* 3, no. 4 (2005): 896-919. See also Sarkin, J. "The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaca Courts in dealing with the genocide", *Journal of African Law* 45, no. 2 (2001): 143-172; Rettig, M., "Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?" *African Studies Review* 51, no. 3, (December 2008): 25-50.

²⁵⁷ E.g., HRC, *Analytical study on human rights and transitional justice*, 6 August 2009. UN. A/HRC/12/18, available at: <http://www.unhcr.org/refworld/docid/4a9d1be40.html>, paras. 50 – 51; CHR, *Resolution 2005/66: Right to the Truth*, para. 2 – 3; HRC, *Concluding observations on Central African Republic*, 27 July 2006. UN. Doc. CCPR/C/CAF/CO/2, para. 8.

²⁵⁸ CHR, *Updated Set of Principles to Combat Impunity*, Principle 5: Guarantees to give effect to the right to know

of truth-seeking in the effort of clarifying mass violations.²⁵⁹ Their reports have been used in courts as objective evidence of the historical context in which the specific cases took place.²⁶⁰

In comparison with judicial proceedings, these commissions differ greatly in both the aim they pursue and the type of investigation they apply. On the first aspect, they mostly aim at the clarification and disclosure of historical facts of a violent past. They are responsible to construct the broadest picture of the pattern of violence, digging out causes and roots and understanding the social dynamics behind the abuses. The focus is on the victims, first and foremost, and then on the society in general. Although they may name names, to establish individual accountabilities is not their main task, rather they establish “collective guilt”.²⁶¹ An additional, but frequent aim is the reconciliation mission, which is grounded on the idea that obtaining a clear understanding of the past, would allow said past to be composed and overcome. Victims’ testimonies are crucial, both for the investigation purpose and for a cathartic effect on the victims’ lives. Truth commissions deal with facts, emotions, and social ties.

The greatest challenge for these bodies is to analyse the years of violence, and to offer an inclusive narrative that is capable of bringing together different memories and visions of the past - respectful of the differences yet striving for common elements of agreement - in a dialogical understanding.²⁶² The link of their work with the construction of collective memories is straightforward. The need for fostering the individual and collective processes of memory-elaboration and negotiation from the perspective of social healing has frequently been addressed explicitly, constituting a specific focus in most of the commissions’ reports. In these reports, states have often been requested to adopt memory-related measures as instruments of reparations for victims, assurances for preventing the reoccurrence of violence

²⁵⁹ IACtHR, *Case of Zambrano-Vélez et al. v. Ecuador*, paras. 127-129; *Case of Gomes-Lund et al. (v. Brazil)*, para. 297; *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, paras. 178 – 179.

²⁶⁰ See, for instance, IACtHR, *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160.

²⁶¹ Savelsberg and King, *American Memories*, 27.

²⁶² Hayner, P., *Unspeakable truths: transitional justice and the challenge of truth commissions* (New York: Routledge, 2011).

in the future, and means of enhancing the processes of social rehabilitation and reconciliation.²⁶³

An interesting account of the role of truth commissions on the creation of collective memory is put forth in a study by two young scholars, Diana Fuentes Becerra and Gustavo Cote Barco.²⁶⁴ They apply the Halbwachian concept of “points of reference” in the creation of memory to the reports of truth commissions. On this basis, they understand these reports as memory-markers, which create a memory-frame to read and preserve the past. Undeniably, this argument perfectly fits into our discourse. Truth commissions, as well as judicial proceedings, become agents of memory both in time and in space. Contrary to judicial proceedings, however, they go beyond the verification of facts. They physically host individual testimonies, and store their memories. These individual memories are then placed within the broader historical narrative, and sewed together to compose the patchwork representing the collective experience of violence. Looking at the past, but working to create “points of reference” in the present, those commissions become vehicles for the creation of collective memories, and, through their mandate, they control the selection of ‘which truth’ is to be transmitted and remembered. The product they forge is more than history in that it adds individual narratives, memories, emotions, symbols, and meanings to the historical analysis of the fact. At the same time, however, it is not collective memory yet, for it still misses the process of social acknowledgment and elaboration of that narrative as a part of the social common heritage. Although in transitional justice contexts, truth commissions are often not the only channel of memory, they undeniably offer a significant contribution to the creation – o re-creation -, of collective memory.

²⁶³ The Peruvian TRC, for instance, since the introductory chapter of its final report, presents the memory of the past violence in the country as an instrument for restoring victims’ “dignity, (...) for developing and renewing democratic institutions and as a mechanism for promoting popular participation in different fields of the public management of the Country.” Comisión de la Verdad y Reconciliación for Peru, *Informe Final*, 28 August 2003. Introduction, 16. The Commission firstly included memory-related measures in the section devoted to reconciliation – stressing the role of memory in re-creating solid ties between society and the institutions (para. 4.2.3., Ch. 1, IX, p. 92: *El papel de la memoria histórica en la reconciliación.*); then as a precondition for the multiform national plan of reparations (“Programa Integral de Reparaciones” (PIR)), both in the section on symbolic measures and as a component of the process of comprehensive rehabilitation for victims’ mental health (Ch. 2.2.3.1 *Programa de Reparaciones Symbolica* and Ch. 2.2.3.2, *Programa de Reparaciones en Salud.*). Recommendations involving memory-related initiatives were put forth by most of the TRCs in the region.

²⁶⁴ Fuentes Becerra, D.M., Cote Barco, G.E., “El papel de las comisiones de la verdad en la formación de la memoria histórica: ¿Construcción de un relato?” (Thesis, Pontificia Universidad Javeriana, 2004).

Concluding remarks

The chapter explored the duty to investigate as a first item through which international law and its branches may influence and shape the memory of a society. In this regard, it is submitted that: i) Human rights law binds states to investigate into gross human rights abuses. Even in the controversial hypothesis of an admissible conditional amnesty, investigation must be ensured. This means, for our argument, that the clarification of the historical facts constituting abuses is an obligation under human rights law. ii) Human rights law provides indications on how investigation should be conducted. Standards, criteria and mechanisms of investigations are spelled out by human rights bodies. In the case of systematic and massive human rights abuses, in particular, beyond the specific violations, they tend to ask governments also to disclose the whole pattern of violence in which the abuses were committed and to make the results of the investigative processes public and accessible both to the victims and to the whole society. iii) In order to comply with these standards and criteria, states usually implement measures – criminal trials and truth commissions – that by their nature are able to impact on the memory-construction process.

Several aspects of the way in which the legal framework of the duty to investigate under human rights law affects the collective memory process should be noted. Firstly, from a theoretical point of view, it has been observed that courts and monitoring bodies justify the duty to investigate through strong legal claims that emerge from the transitional justice contexts. The fight against impunity, access to justice, and reparations for victims are all powerful arguments to justify a legal intervention on the political decision of governments to choose whether to deal or not with their past. Moreover, these legal rationales introduce a first layer of restrictions to the actual scope of the duty to investigate. As a consequence, the classification of the main legal justifications of duty may affect the concrete outcomes of the inquiries by filtering the accounts of the facts through the viewpoint of the rationale that upholds the duty, and thereby producing partial accounts of the past that circulate among the society.

Secondly, by elaborating criteria and modalities that states are to follow in order to meet the international standards of effective investigations, human rights law guides the manner in which inquiries should be conducted, and therefore impacts on the accounts they produce. Looking at the case law, the chapter has indicated the set of standards and criteria developed in international *fora*. Generally speaking, investigations are to be well timed,

expeditious, and complete. Scientific means of inquiry should be used. Moreover, the inclusion of public scrutiny as a condition for an effective investigation, and the requirement of public dissemination of the findings turn investigations into instruments of memory-making. By requiring investigations to be public and widely accessible to the society, human rights bodies ensure that the events they revealed are not silenced. They call not only for recognition and acknowledgment of the past, but also for its public dissemination. States are to look into the atrocities they committed in order to explain them and make their history available to the society. The duty to investigate imposes two steps on the process of dealing with the past: discovering the facts, and conveying them to the future to be remembered. Silence and oblivion are not permissible.

Thirdly, looking at the practice of investigations, it has been noted that, in the case of the most serious human rights abuses, judicial proceedings have mostly been required. Criminal law, in particular, has been used as the main instruments to comply with the obligation to investigate. As a consequence, in the framework of the fight against impunity in the context of mass violence, criminal law investigations resulted to be the main instrument for clarifying not only the specific facts which supported the legal claims in courts, but also the whole historical configuration in which those abuses took place. This means that the records of mass crimes and their whole context are filtered by criminal law procedures and mechanisms. Yet, as has been noted, criminal law is primarily meant for establishing individual responsibility. It is about certainty and binary solutions. It is about one, established, uncontroversial, judicial truth. Rules of evidence and testimonies, time-bars, principles of criminal responsibility, and the other criminal justice means are established precisely for these aims. The application of these instruments in the analysis of the past may offer only a partial, judicial reading of all facets of the violence, and it can thus alter the creation of historical records which are capable of determining the collective memory within the society. While alternative measures of investigation and truth seeking have been encouraged, the trend in human rights law is to simultaneously crystallize a legal obligation to criminal investigation for serious human rights violations. However, if the duty to investigate is mandatory for criminal justice measures, but is not compulsory for non-judicial mechanisms for the historical clarification of the context, there is a risk of human rights favouring the “judicial truth” over the “historical truth” in the processes of transitional justice. While the establishment of a

“judicial truth” is in fact an international legal duty, the inquiry into the historical facts through historical means is a political choice of the governments. As a consequence, the past is mandatorily reviewed and interpreted through the lens of judicial proceedings, but not necessary through other, and perhaps more appropriate mechanisms of historical research.

Fourthly, the *favor* of human rights law for the creation of transitional justice mechanisms of truth seeking, such as truth commissions, which are considered to complement the work of judicial mechanisms, encourages states to implement these mechanisms in the aftermath of mass violations. This chapter has assessed this practice, highlighting the effects these bodies have on the determination of memory. It has been noted that public hearings – including both truth commissions and trials – are sites in which past injustices are conveyed as present memories through testimonies.²⁶⁵ However, while the synergy between truth commissions and trials in many cases has proven successful in strengthening the process of democratic transition, from the standpoint of memory, the coexistence of different bodies may complicate the process of providing a comprehensive and shared account of the past. Some individual claims may find legal standing in courts, while others may be rejected on the basis of procedural arguments. The voices of some witnesses who were heard in the rooms of truth commissions might be excluded from the courtrooms, and therefore may receive a different degree of recognition and authority in the socially acknowledged accounts of the events. Similarly, some events that occurred in the remote past may have had an impact on the subsequent dynamics of the abuses, but at the same time they may be omitted from the investigations of judicial proceedings for lack of competence *ratione temporis*, or simply because they do not meet the threshold of criminal acts. Such events will consequently be excluded from the judicial account of the history, but perhaps included in the account provided by truth commissions. These differences may eventually cause the risk of creating hierarchies of truths.²⁶⁶ They may well affect the way a society perceives traumatic past events that it has experienced, and therefore the way these events are processed and included in (or excluded from) the record of the historical heritage of the society. All the same, however, the

²⁶⁵ Spring, K., “Judging War, Judging History: Behind Truth and Reconciliation” *Memory Studies* 5, no. 3 (2012): 343-345.

²⁶⁶ I should like to thank my supervisor, Professor Rubio Marín, for the meaningful concept of “hierarchy of truths”, which expresses the intricate interplay of institutions in writing history and ascertaining truths very well.

coexistence of different voices that read into the events, together with the publicity that the law needs for such readings within the society, may enrich the set of points of reference for the social process of memory-making. In this sense, if different narratives come to light at the same time, with comparable authority, they may contribute equally to the fluid creation of different memories, all with the same dignity. In the different voices, different individual memories can be reflected, and find identity and recognition. In that case, it will be up to the society to reconcile them, and find a balance to let them exist and coexist as part of the same historical heritage.

Chapter III

The Duty to Disclose

Introduction

In the previous chapter, I argued that a precondition for allowing a society to produce faithful representations of the history of gross human rights violations as images of memories is the clarification of the facts that constituted those violations. The duty to ascertain the truth, in this sense, is the first step in the construction of memories of a violent past that international law interferes with. Yet, investigations would be pointless if the information they provide is not accessible to the victims, first and foremost, and subsequently to the whole society. Hence, the second step that international law takes in influencing the process of memory making is to encourage states to make this information available to victims and other individuals. To do so, it guides states – in a more or less compulsory way – in their behaviours concerning the management and dissemination of knowledge about the past, and develops standards and guidelines to this effect. These behaviours range from ensuring access to state-held documents related to human rights violations to disclosing information on the abuses and making it public, and from creating efficient systems to process information requests to implementing specific legislation to achieve these goals. This set of behaviours, I argue, constitutes an additional aspect of the content of the duty of memory, which aims at providing and disclosing state information concerning patterns of systematic violence and illegality. In synthesis, I will refer to this feature as to the ‘duty to disclose’. This will be the object of the present chapter.

The chapter aims at clarifying the legal regime of the duty to disclose under international law, in order to grasp its impact on the memory processes of representing mass human rights abuses of the past. It is divided into four main parts. The first part aims at clarifying the connections between the legal regime of the duty to disclose information concerning gross human rights violations and the processes of memory-making. It provides some considerations about the relevance of international norms in regulating the public circulation of state-held information related to past human rights abuses for the dissemination of historical knowledge within the society. The second part presents the legal analysis of the state duty to disclose and its development under international law. In this part, several aspects

of the duty to disclose are analysed: its legal foundation – the right to access information; the recognition it has received in human rights instruments and practice; international principles and standards which refine it. The third part specifies the features of the state duty to disclose in the case of information concerning gross violations of human rights committed in the past. In doing so, this part introduces the discussion about the legitimacy under human rights provisions of secret state archives and state policies which shield documents concerning past violence from public scrutiny. The fourth part, finally, presents the emerging practice adopted by transitional states aimed at opening secret archives of past regimes, and it points out the consequences thereof for the dynamics of memory.

1. Memory and the Duty to Disclose Information

Disclosing state records related to patterns of systematic violence and human rights abuses in the past means nourishing the collective memory of a society with original information about its collective history. Documents are sources for history, but also for memory.²⁶⁷ With the passage of time, individual narratives that recount personal experiences fade away, and memories rely on *lieux de memoire* to overcome the time and to navigate through generations.²⁶⁸ Historical documents are *lieux de memoire par excellence*, in that they embody points of references in the past. The opening of the files related to violations committed in the past undoubtedly firstly aims at truth revelation.²⁶⁹ However, the amount and type of data publicly accessible also influences which narratives about the past will circulate within society, and how they will be perceived.

The way in which international law frames a state duty to disclose information is therefore relevant for the way collective and official memories take shape and circulate in the society. When international judgments and legal provisions require that states apply specific standards and principles in disclosing information, they construct a framework for memories-production. When complying with these rules, states are not longer free to decide to what extent knowledge about the past can circulate in the society, and who is entitled to access information on the past. The state's control over the interpretations and representations of the

²⁶⁷ Jay Winter affirms that “History is Memory seen through documents. Memory is History seen through affect”. Winter, informal meeting held on 25 March 2014, EUI, Law Department, Florence.

²⁶⁸ Assmann, J. “Collective memory and Cultural Identity”. *New German Critique* 65, (1995): 125-133.

²⁶⁹ Stan, L. and Nedelsky, N., eds., *Encyclopedia of Transitional Justice*, Vol. 1. (New York: Cambridge University Press, 2013), 1.

past shrinks, and officially-constructed narratives are counter-balanced by the creation of independent accounts.

In this sense, Stan argues that access to information - in particular to secret information - “democratizes truth seeking by allowing victims to control the process and ordinary citizens to contrast the truth contained in the files with their own recollection of past events”.²⁷⁰ This process, I believe, at the same time democratizes memory too. In opening the files, governments confer the right of interpreting the past to everyone who is entitled to access them. And this free and public interpretation of information produces independent narratives, which circulate in the public space. Individual memories come to face data that corroborate or discredit them. Moreover, in case of full disclosure of information, official narratives also suffer the same fate, since the disclosed documents may be used by independent narratives to challenge them. Conversely, when access is limited, restricted, or manipulated, or when specific categories of individuals receive preferred access, the information that will leak to the public will unequally affect the extant narratives. In doing so, undemocratic or non-transparent regulations on access to information consequently manipulate – consciously or unconsciously – the dynamics of collective memories.

In this process of democratization of the past – or, more precisely, democratization of the access to the past –, memory fully expresses its fluid nature, which opens it up to discussion and comparison. Hegemonic narratives are hard to support when full access to information can be exercised by individuals. As Stan puts it, “the state cannot control how documents are interpreted by those who read them”. Affirming a positive state duty to disclose information therefore means, for the cases of past human rights violations, that states are expected to allow their citizens to scrutinize the past freely, to measure their memories against objective data, and ultimately to develop independent representations of the history. Moreover, the disclosure of personal files and documents - as in the case of the communist secret files that will be explored later in this chapter - contributes to the dialogue between the collective dimension of memory and the personal experiences of individuals by facilitating the introduction of individual stories to a broader historical reading of the violent past.

²⁷⁰ Stan, L., *Transitional Justice in Post-Communist Romania. Politics of Memory* (New York: Cambridge University Press, 2013), 60.

At the same time, however, public disclosure of information may complicate the relationship between memory and history. On the one hand, the democratic access to historical documents concerning past periods of systematic violence enhances the proactive discussion and development of memories regarding particularly traumatic events in the society. On the other hand, in doing so, it blurs the line between professional interpretation of the past through the conventional methods of the historiographical research and personal assessment of historical sources by ordinary individuals for personal and public use.²⁷¹ In other words, the risk exists that historical documents and data will be read and presented to the society through the language of memory – mediated by emotions and individual experience – which is, by nature, always disputable and evolving.²⁷² Whilst this may enrich the multiplicity of voices that read the past, at the same time it could impact on how history is understood and reconstructed, and, again, on how memory-narratives are produced within, and spread throughout the society. Strong, democratic, legal frameworks should be able to ensure effective protection of freedom of expression and freedom of information, and therefore create different channels for expressing and challenging competing accounts. In such systems, the ordinary mechanisms of democracy should naturally lead to open discussions about controversial subjects, including historical debates, and let different opinions coexist. However, as I will argue further in Chapter IV, the inaccurate management of information related to the past may create the risk of manipulation of data and documents. This, in turn, may well lead to worrisome misinterpretation and revisionist readings of the past.

Hence, it should remain clear that by elaborating and regulating a state duty to disclose information about the past, international law regulates a specific dimension of the link between a state and its past, which relates to the complicated interplay between history and memory. This aspect brings many thorny issues with it. Therefore, it is important for this investigation to understand the concrete scope and standards of a possible obligation to disclose under international law.

²⁷¹ The same stance is taken by Stan, *Transitional Justice in Post-Communist Romania*, 60.

²⁷² “Memory is History seen through affect”. Winter, J., informal meeting held on 25 March 2014, EUI, Law Department, Florence.

2. The legal basis to the Duty to Disclose: The Right to Access to Information

2.1 Legal Foundation

The duty to disclose is a controversial item. Although it has received great attention at the international level, and many developments point toward its establishment in the legal system of human rights protection, it has not been fully and unanimously recognized by the main international adjudication *fora* yet. The international legal scholarship is similarly divided between interpretations suggesting possible conceptualizations under the current legal framework, and sceptical analyses which deny it any legal ground. In the light of this doctrinal and jurisprudential uncertainty, this section attempts to offer some clarification on the legal foundations of a state duty to disclose in the human rights framework.

The legal bases for the state duty to provide and disclose information can be traced to the right to access to information. In spite of the various doctrinal discussions about its nature and status, access to information is nowadays a well-established right in human rights law. While there is only one official, binding international convention that explicitly recognizes an autonomous right of access to official documents held by public authorities,²⁷³ most of the general human rights instruments in fact refer to such an entitlement. It is firstly conceptualized as a corollary of freedom of information, which in turn is part of the fundamental freedom of opinion and expression. In the universal systems of human rights protection, freedom of information is firstly enshrined in the Universal Declaration of Human Rights, which recognizes that everyone has the right to “seek, receive and impart information and ideas through any media and regardless of frontiers”.²⁷⁴ Similarly, the International Covenant on Civil and Political Rights (ICCPR) sanctions the fundamental right to information, and subsumes it under the content of freedom of expression.²⁷⁵ In the regional systems of human rights protection, Article 13 of the American Convention on Human Rights,

²⁷³ CoE, *Convention on Access to Official Documents*, CETS 205, 18 June 2009, available at <http://conventions.coe.int>. To date, the Convention has not entered into force yet. It has been signed by 14 Member States, and ratified by 6 of them. 10 ratifications are required for the Treaty to enter into force (data verified up till 20.12.2014).

²⁷⁴ UDHR, Art. 19.

²⁷⁵ UN GA, *International Covenant on Civil and Political Rights* [ICCPR], 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>. Art. 19.2: Freedom of opinion.

Article 9 of the African Charter on Human and Peoples' Rights, and Article 10 of the European Convention on Human Rights also recognize and protect the right to information in similar terms. At the domestic level, most legal systems provide the citizens' right to obtain public information as a fundamental right, either explicitly enshrined in constitutional texts or incorporated in *ad hoc* information laws.²⁷⁶ From these provisions, national courts have repeatedly derived and upheld the consequent obligation of public bodies to provide, disclose, and release government-held information.²⁷⁷ The right to access to information has therefore gradually been recognized as a fundamental right in domestic, regional, and international legal texts.

Access to information is an important tool to exercise a number of individual rights, and to protect collective interests. It is instrumental in the enjoyment of the right to privacy, the right to health, and the right to a fair trial - just to mention some. Hence, its recognition often has been presented as ancillary to the full enjoyment of other, different fundamental rights. Precisely because of this instrumental feature, and because of the different right holders who may enjoy its empowerment, both the literature and the practice of national and international human rights adjudicatory and quasi-adjudicatory bodies have proposed different theoretical conceptualizations for the right to access to information. Since these two aspects – the personal element of the beneficiaries and the theoretical legal conceptualizations of the right – are closely entwined, in the next paragraph I will analyse the latter in relation to the former.

2.1.1 Beneficiaries and Rationales of the Right to Access to Information. Different Conceptualizations.

As noted by the UN Special Rapporteur on Freedom of Expression, the right to information includes different layers.

²⁷⁶ According to the study carried out by two NGOs, Open Society Institute and Access Info Europe, as of September 2013, at least 95 countries explicitly grant the right to information. See <http://right2info.org>. For a complete list of countries that adopted access to information regulation, see http://www.right2info.org/resources/publications/laws-1/countries-with-foi-laws_march-2013.

²⁷⁷ In this regard, see, among others, the Hungarian Constitutional Court's judgment No. 32/2006, 13 July 2006, (Official Gazette 2006/84). A summary of the decision is available in English at: <http://codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>. See also Colombian Const. Court, Judgment No. C-872/03, 30 September 2003, available at: <http://www.corteconstitucional.gov.co/relatoria/2003/c-872-03.htm>; Judgment No. C-370/06, 18 May 2006, available at: <http://www.corteconstitucional.gov.co/relatoria/2006/c-370-06.htm> and Judgment No. C-491/07, 27 June 2007, available at: <http://www.corteconstitucional.gov.co/relatoria/2007/c-491-07.htm>.

It encompasses both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights.²⁷⁸

The individual and collective dimensions are therefore the two main aspects of the right to information.²⁷⁹

At the individual level, the right to information firstly entails the individual right to access state-held documents concerning personal files and data, or other information that may affect individual rights. The existence of personal information in the hands of public bodies implies the individual's interest in accessing them. As a consequence, no further evidence should be required for the individual to obtain access to personal information.²⁸⁰ This entails, in turn, that public bodies, in principle, have an obligation to disclose that information upon request. Any refusal or restriction has to be justified and motivated.

In the case of human rights violations, the individual dimension is further specified in the victims' right to access personal files. In these cases, especially in situations of serious and widespread violations, different grounds have been used to strengthen the victims' right to get to know the circumstances and conditions in which their rights – or those of their next of kin – were violated. First of all, especially in the Inter-American context, the right to the truth has provided the basis for the assertion of a state duty to provide victims and their relatives with

²⁷⁸ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 4 December 2013, UN. Doc. A/68/362, para. 19.

²⁷⁹ Similarly, in the *Claude Reyes* decision, the IACtHR clarified that “the right to freedom of thought and expression includes the protection of the right of access to state-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State”. IACtHR, *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006. Series C No. 151, para. 77. Similar statements can consistently be found in a number works of the OAS Special Rapporteurs for Freedom of Expression. See, e.g., *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 30 December 2004, Ch II para. 22; *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 30 December 2009, OEA/Ser.L/V/II.Doc. 51, para. 507; *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 31 December 2013, OEA/Ser.L/V/II.149.Doc. 50, para. 578.

²⁸⁰ *Claude-Reyes et al. v. Chile*, para.77; ECtHR, *Joanna Szulc v. Poland*. App. No. 43932/08. Judgment of 13 November 2012, paras. 85-87; HRC, *Toktakunov v. Kyrgyzstan*, Comm. No. 1470/2006, 28 March 2011, UN. Doc. CCPR/C/101/D/1470/2006, para. 6.3.

all the information necessary.²⁸¹ In this conceptualization, the rationales for advocating a victims' right to information range from the general prohibition of torture, inhuman and degrading treatments²⁸² to the state obligation to investigate;²⁸³ and from the remedial rationale²⁸⁴ to the protection of a legitimate social expectation.²⁸⁵

In relation to serious human rights breaches, besides the grounds provided by the right to the truth, access to information has been also understood as a form of satisfaction for victims and their families. In this regard, both the HRCBiH and the IACtHR linked it to the victims' right to reparations. In the judgment on the Srebrenica cases, as a form of reparation, the Human Rights Chamber ordered the Republika Srpska "to release all information (...) within its possession, control, and knowledge' regarding the fate and whereabouts of the missing persons".²⁸⁶ Similarly, in the *Claude Reyes* decision – in which the IACtHR condemned Chile for the unjustified failure to provide victims with information –, the Court ordered that the required information be made available to the victims as a measure of satisfaction and guarantee of non-repetition. At the same time, the Court urged the state to implement adequate measures to protect the general right to access to official documents, including appropriate administrative systems to manage victims' requests for information in

²⁸¹ Already in *Velásquez Rodríguez*, the IACtHR requested that the state "use the means at its disposal" to provide the relatives with all the information concerning the fate of the victims. IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, para. 181. This approach has been kept constant by the Court, which developed it further in its subsequent jurisprudence.

²⁸² The European Court of Human Rights' jurisprudence related to cases of enforced disappearance, for instance, has often categorized the failure to provide victims' families with information about their next-of-kin's victimization as a violation of the prohibition of torture and inhuman treatments. For this reason, in several decisions, it has subsumed the violation of the right to information under the latter crime. E.g., ECtHR, *Cyprus v. Turkey*, App. No. 25781/94. Judgment of 10 May 2001, paras. 157-158. The Inter-American counterpart has followed the same approach in a number of decisions. IACtHR, *Case of Gomes Lund et al. v. Brazil*, para. 240. Similarly, HRC, *Quinteros et al. v. Uruguay*, Comm. No. 107/1981, 21 July 1983, UN. Doc. CCPR/C/OP/2 at 138 (1990), para. 14.

²⁸³ See, inter alia, IACtHR, *Case of Bámaca-Velásquez v. Guatemala*. Merits, para. 201.

²⁸⁴ IACtHR, *Case of Anzualdo Castro v. Peru*, para. 183; IACommHR, *Ellacuria, S.J.y Otros v. El Salvador*, Case 10.488, Report N° 136/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 608 (1999), para 227.

²⁸⁵ CHR, *Updated Set of Principles to Combat Impunity*, Principle. 17. See also, IACtHR, *Case of Bámaca-Velásquez v. Guatemala*. Merits. Separate Concurring Opinion of Judge Sergio García-Ramírez para. 19. The different underpinnings of the victims' right to the truth were discussed in the previous chapter. See *supra*, Ch.II, paras. 2.1.1-2.1.4.

²⁸⁶ HRCBiH, *Selimović and 48 others against Republika Srpska (Srebrenica cases)*. Admissibility and Merits. Case No. CH/01/8365. Decision of 7 March 2003, para. 211.

an effective manner. Lastly, the state was required to set up *ad hoc* training programs for public officers in this matter.²⁸⁷

From the perspective of satisfaction, especially in cases of mass human rights abuses, victims' access to information is further enriched by the element of publicity. The victims' right to know entails a certain degree of recognition from the state. In order for this recognition to cause some healing effects for victims, the disclosure of information has to be public and official. This is why judicial orders that recommend governments to make public and disseminate findings of judicial investigations and truth seeking bodies, often in the context of public and official ceremonies, prove especially meaningful with regard to memory-making dynamics. In this sense, the legal basis of the victims' right to access information overlaps with the content of the victims' right to reparation.²⁸⁸

The individual dimension of the right to access information also encompasses the individual right to get to know information of public relevance. This means that, if information concerns matters of general interest to the society, it should be made available to each citizen. This aspect proves particularly relevant for our discussion because it creates a bridge between the individual and the collective dimension of the right to information. When the required information concerns matters of general interest, in fact, not only the individual has a legitimate justification for accessing it, but also the society has a legitimate interest in receiving that information. From this viewpoint, the individual right to information is closely entwined with the collective dimension of the right to information in that it provides a basis for protecting the public right to know.

In the practice of human rights bodies, the individual right to public information has been used to enable the society's right to know by according special protection for accessing information to specific categories of requesters. As we will see in the forthcoming analysis, judicial and quasi-judicial human rights bodies have recognized the 'vital role' of specific categories of individuals - such as the press and other media, but also civil society organizations and other categories serving functions of public information (like historians) – in making information of public interest circulate within the society. By their activities, these

²⁸⁷ IACtHR, *Claude Reyes et al. v. Chile*, para. 157 – 165.

²⁸⁸ *Infra*, Ch. V.

individuals enable members of the public to exercise their rights, and to develop and elaborate free and informed opinions in democratic *fora*. In the dynamics of memory-making, this interplay between the individual and collective dimensions of access to information clearly facilitates interchanges between personal and public narratives about the past. Because of the relevance of this interplay in the processes of memory-making, the rest of the analysis will focus on this specific dimension of the right to access to information, as the main legal basis for the state duty to disclose information of public interest.

3. Inferring a State Duty to Disclose from the Public Right to Access to Information? The State of the Art

As argued, the right to access to information is now considered well established in the human rights legal framework. Yet, whether a corresponding, positive obligation of states to disclose state-held information arises in international law as a consequence of the right to access to information is controversial. Most of the literature in this regard is rather sceptical of recognizing such a positive obligation.²⁸⁹ Indeed, for a long time, the right to information, when derived from the legal basis of freedom of expression, has been constructed as the general individual freedom to seek and receive information, which would merely entail a negative obligation for governments not to interfere with the individual efforts to gather public information and to refrain from limiting information flows. In other words, the recognition of freedom of information is not considered to imply that states have a corresponding obligation to disclose such information proactively.

Nonetheless, from a glance at the interpretation and protection of the right to information in the case law of human rights bodies and in international and regional legal texts and documents, one can observe that, at least in some specific circumstances, there is an emerging trend recognizing such a positive obligation. In what follows, I will present the

²⁸⁹ Weeramantry, C.G., “Access to information: a new human right. The right to know.” *Asian Yearbook of International Law* 4 (1994): 99-125; McDonagh, M., “The Right to Information in International Human Rights Law”, *Human Rights Law Review* 13, no. 1 (2013), pp. 1-31; Hins, W. and Voorhoof, D., “Access to State-Held Information: A Fundamental Right”, *European Constitutional Law Review* 3, no. 1 (2007): 114-126. Although with different degrees of analysis, these authors mostly focus on the legal status of the right to access to information, without going as far as recognizing a correspondent obligation on states to disclose information. *Contra*: Bishop, C. A., “Internationalizing the right to know: Conceptualizations of access to information in human rights law”. (Ph.D. Thesis, University of North Carolina, 2009). She recognizes the existence of a positive state obligation to disclose within the scope of the right to access to information in the right-to-truth conceptualization, and (albeit with some limitations) in the freedom-of-expression conceptualization.

relevant cases and documents, in order to clarify the status of the duty to disclose information in human rights law, and to specify its features and standards.

3.1 The Duty to Disclose in the case law

The main human rights monitoring bodies and courts have addressed the issue of the public access to information from different angles, adopting different approaches. As mentioned above, different legal bases have been used to protect the individual interest to obtain state-held information, although the provisions on freedom of information have offered the main grounds in the argument for the existence of a state obligation to provide and disclose information to the public. Although overall there are signals pointing toward the progressive recognition of such an obligation, human rights bodies have progressed at different speeds in asserting its existence.

The most cautious approach to the recognition of a state obligation to disclose information is used by the European Court of Human Rights. The Court, while protecting the individual right to personal information on different legal bases, consistently upheld the view that Article 10 ECHR could not “be constructed as imposing on a State (...) positive obligations to collect and disseminate information of its own motion” for a long time.²⁹⁰ Since the *Leander case*, and until more recent developments, the Court was reluctant to even grant the public a general right of access to government-held information.²⁹¹ This hesitancy naturally also extended to the recognition of a state obligation to disclose. Indeed, the Court had repeatedly denied that freedom of information would entail a corresponding state obligation to disclose information.²⁹²

More recently, however, the Court has changed its approach slightly. In 2009, in *Társaság a Szabadságjogokért v. Hungary*, the Court stressed the judicial advances made towards a broader interpretation of the notion of “freedom to receive information”, and

²⁹⁰ ECtHR, *Guerra and others v. Italy*, App. No. 14967/89. Judgment of 19 February 1998, para. 53.

²⁹¹ See McDonagh, “The Right to Information in International Human Rights Law”, 10-11.

²⁹² ECtHR, *Leander v. Sweden*, App. No. 9248/81. Judgment of 26 March 1987, para. 74;; *Gaskin v. The United Kingdom*, App. No. 10454/83. Judgment of 7 July 1989, para. 52; *Guerra and others v. Italy*, para. 53. However, in some other cases, the Court, recognized the individual right to receive information on other legal grounds, such as ECHR Art. 8: Right to private life, Art. 6: Right to a fair trial, and Art. 2: Right to life.

therefore “towards the recognition of a right of access to information”.²⁹³ The *Társaság case* concerned a claim against the government by a Hungarian NGO on the basis of the Constitutional Court’s refusal to grant access to information it held. The contested information concerned a complaint, presented by a member of the Hungarian parliament, about the constitutional revision of criminal legislation on drug-related offences. The Constitutional Court had justified the restriction to that piece of information with the need to protect the MP’s personal data included in the complaint. The ECtHR preliminary recalled that it had “consistently recognised that the public has a right to receive information of general interest”. It further held that “the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information”.²⁹⁴ As a result, states have an obligation “not to impede the flow of information” within a society. The Court concluded that the contested denial of information was an interference with the rights protected by Article 10, and consequently found the state responsible for the violation of that provision. Yet, we are still far from a recognition of the state duty to disclose information.

However, in *Társaság*, the Court admittedly did not decide on the basis of a “general right of access to official documents”, which the Court seems to reject,²⁹⁵ but rather on the basis of the specific function of “social watchdog” that the NGO played within the society.²⁹⁶ The special nature of the requester, as mentioned before, is a crucial element in the recognition of the state duty to disclose, and - as will become apparent from the overview of the case law - it is common to most of the human rights decisions recognizing a right to information of public interest. The Court reinforced this reading in the subsequent *Kenedi v. Hungary* decision.²⁹⁷ In that decision, the Court adjudicated on the case of a Hungarian historian conducting research on the national secret service, whose request to access state-held files was denied. The Court held that “access to original documentary sources for legitimate historical research [is] an essential element of the applicant’s right to freedom of expression”.²⁹⁸ Again,

²⁹³ ECtHR, *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05. Judgment of 14 April 2009, para. 35.

²⁹⁴ *Ibid.*, para. 27.

²⁹⁵ *Ibid.*, para. 35.

²⁹⁶ The same argument was adopted by the Court in the more recent decision *Youth Initiative for Human Rights v. Serbia*, App. No. 48135/06. Judgment of 25 June 2013, paras. 20-26.

²⁹⁷ ECtHR, *Kenedi v. Hungary*, App. No. 31475/05. Judgment 26 May 2009.

²⁹⁸ *Ibid.*, para. 43.

the recognition of such a right seems to be subordinated to a general public interest in the information, namely “the objective study on the functioning of the Hungarian State Security Service” that the researcher would have published on the basis of the requested documents.²⁹⁹ These developments in the case law seem to indicate that the Court, while not recognizing a positive state duty to proactively disclose information, is however moving toward a broader understanding of a public right to access to state-held information, at least in cases where the information is required by special categories of individuals for disseminating public information.

The HRC and IACtHR have developed a more favourable approach toward the recognition of a duty to disclose information as a corollary of the right to public information. While the Committee has dealt with the public right to access to state-held information in a limited number of cases, the Inter-American Court has developed a more robust jurisprudence on the matter. The Human Right Committee firstly recognized the right to access to information in a case related to the press members’ right to have access to press facilities in parliament. In those circumstances, it asserted the citizens’ right to have “wide access to information”, and recognized the role of the media in providing and disseminating it.³⁰⁰ In subsequent decisions, the Committee further elaborated on the nature and content of the right to access to information. Let us consider the reasoning of the Committee in the *Toktakunov v. Kyrgyzstan* decision.³⁰¹ In that case, the applicant was a human rights association’s legal consultant. The public authority had refused to give him access to national data on the use of the death penalty in the country, claiming the confidential nature of that information. The Committee found that the government’s denial had infringed his rights under Article 19.

To justify its decision, the Committee mostly relied on the nature of the restricted information, and on the applicant’s capacity. Regarding the first aspect – the nature of the information –, the Committee considered the information on the death penalty a “[matter] of

²⁹⁹ Ibid., paras. 3 and 40. In that case, however, the Court did not discuss the legitimacy of the historical research conducted by the applicant for justifying the restriction of the individual freedom, since it had already found that the restriction had not been “provided by law”, and therefore it was inadmissible under para.3 of Art.10. See McDonagh, “Right to Information in International Human Rights Law”, 25.

³⁰⁰ HRC, *Robert W. Gauthier v. Canada*, Comm. No. 633/1995, 5 May 1999, UN. Doc. CCPR/C/65/D/633/1995, paras. 13.4, 13.6.

³⁰¹ HRC, *Toktakunov v. Kyrgyzstan*.

legitimate public concern”, societal discussion of which should be considered worthy of protection.³⁰² On this basis, it asserted a state obligation to provide information to the requester. With regard to the second argument - the special capacity of the requester -, the Committee emphasized that the individual right to information is instrumental in the societal interest to receive information. It found that “the delivery of information to an individual can (...) permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it”.³⁰³ On the one hand, the right to information empowers the individual to receive information he or she is interested in – without the need to specify a direct interest or personal involvement in it.³⁰⁴ On the other hand, this right is a precondition for allowing a society to fully exercise its freedom of opinion and expression about public affairs, and thereby take active part in the democratic decision-making process.³⁰⁵ An uninformed society, it seems to imply, lacks the essential instruments for constructing opinions capable of leading to democratic debates. Because of the importance of ensuring this flow of information, individuals performing a special informative function within the society should be granted an exhaustive protection of their right to information, because of their particularly relevant social function. In this case, the applicant was considered to have this “special ‘watchdog’ function”, facilitating the societal debate, because of his position within the human rights association. As a consequence, the Committee concluded that, in those circumstances, “the state party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3”.

We can draw specific conclusions from this decision. Firstly, the Committee recognizes not only an individual right to seek information, but also the positive state obligation to provide it. Secondly, this positive obligation is subordinated to a sort of public interest requirement. In other words, states are required to disclose information when this information is especially relevant for matters of public interest. In these cases, restrictions to the right to access to information should be carefully evaluated according to the test provided by paragraph 3, Article 19.

³⁰² Ibid., paras. 6.3, 7.4, 7.7.

³⁰³ Ibid, para. 7.4.

³⁰⁴ Ibid., para. 6.3.

³⁰⁵ Ibid., paras. 6.3, 7.4.

On the American continent, the connection between the right to access to information and the state duty to disclose has been straightforward. The Inter-American institutions have been at the forefront in recognizing both a general right for the public to receive state-held information, and the corresponding state duty to provide and disclose such information. The milestone for recognizing and framing the content of the public right to access is certainly the oft-quoted *Claude Reyes* case, in which the Inter-American Court of Human Rights, for the first time, explicitly inferred the right to information as a necessary part of freedom of expression.³⁰⁶ From this, the Court also inferred a consequent, positive state obligation to provide information. The case originated in the refusal to disclose requested state-held information by the Chilean authorities. The requesters were members of an environmental group, and the information related to a deforestation project. The case was firstly adjudicated by the Inter American Commission on Human Rights, which found Chile guilty of violating of Article 13 of the American Convention – freedom of expression –, and recommended the country to disclose the required information.³⁰⁷ Since the state failed to comply with the Commission’s recommendation, the case was brought before the Court.

Assessing the merits of the case, with regard to the alleged violation of Article 13, the Court framed the terms in which the right to information was understood. Since then, those terms have consistently informed the subsequent developments of the Inter-American jurisprudence on the matter. The Court has broadly conceptualized the right to receive state-held information, from which it has derived the corresponding positive obligation to provide it. The requester does not need to prove direct interest or personal involvement in order to obtain information, unless the information is legitimately restricted. On the contrary, the Court has reversed the *onus probandi* on the state, so that it has to prove the legitimacy of every exception to this principle. Although restrictions are allowed in principle, every denial of information must always be explicitly justified by the state, and has to meet the requirements for exceptions provided by Article 13.³⁰⁸

³⁰⁶ *Claude Reyes et al. v. Chile*, supra, at 287.

³⁰⁷ IACommHR, *Report No. 31/05*, 7 March 2005.

³⁰⁸ I.e., respect for the rights or reputations of others; protection of national security, public order, or public health or morals. Moreover, they should be necessary to a democratic society. Art. 13.2.

The *Claude Reyes* judgment anticipated the stance taken subsequently by the HRC in the *Kyrgyzstan* case. It clearly articulated the double dimension of the right to access to information, individual and social. These two dimensions of the right to access to information, according to the Court, “must be guaranteed simultaneously by the State”.³⁰⁹ To substantiate its argument, the Court mostly relied on the principles of democracy and transparency in state governance. It invoked the principle of disclosure in the public administration, and upheld social participation and governments’ accountability as underlying values ensured by the right to access to information. Similar to the ECtHRs argument in *Toktakunov v. Kyrgyzstan*, yet more explicitly, this decision seems to hold that limits to the state obligation to disclose information of public interest should reach a higher threshold of legitimacy in order to be considered admissible in comparison to those applicable to information of personal nature.

3.1.1 Assessing the case law

Some intermediate conclusions can be drawn with regard to the status of a state obligation to disclose information in the current framework of international law from the preceding glance at the case law. First of all, it can be said that, in the current jurisprudence of the main human rights courts and monitoring bodies, there is consensus on deriving an individual right to access to state-held information from the provisions protecting freedom of expression. From this right, certainly a negative state obligation to refrain from interfering with the individual access to public documents in the hands of the governments can be derived.³¹⁰ Hence, states do not have a positive obligation to proactively disclose all information, but restrictions to state-held information must meet the requirements established for restrictions to freedom of information.

³⁰⁹ IACtHR, *Claude Reyes et al. v. Chile*, para. 77.

³¹⁰ At the domestic level, this aspect has been developed under the concept of ‘informational self-determination’. In 1983, the German Constitutional Court firstly introduced this concept, stating that “in the context of modern data processing, the protection of the individual against unlimited collection, storage, use and disclosure of his/her personal data is encompassed by the general [constitutional] personal rights [...]. This basic right warrants in this respect the capacity of the individual to determine in principle the disclosure and use of his/her personal data. Limitations to this informational self-determination are allowed only in case of overriding public interest.” BVerfGE 65,1 – Volkszählung, Decision of the 15 December 1983 (Census Act). On the concept of informational self-determination see, among others, Schwartz, P. “The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination”, *The American Journal of Comparative Law* 37, no. 4 (1989): 675-701.

In addition, however, a positive states obligation to proactively provide state-held information is progressively emerging, at least in specific circumstances. Two main elements have been prerequisite in the case law for a state obligation to disclose to be found, an objective and a subjective one. The objective condition requires that there is a specific public interest in the information to be disclosed. In fact, all three bodies we examined above use similar rationales to protect the right to information and the corresponding duty to inform. General interest of the society, the importance of fostering an informed debate in democratic society, the need to ensure transparency, and participation of the population in the democratic life of the nation are some of the arguments that are used. The subjective condition takes into account the role played by the requester in society. Indeed, in cases in which a violation to the right to access to information was subsumed under the provisions on freedom of information, a more expansive right was recognized to individuals who had a particular social capacity of disseminating and circulating information within the society. In other words, in addition to the individual interest in the specific information, human rights bodies have aimed to protect and strengthen the general interest of the societies to be informed about matters that are particularly relevant for the democratic life of their governments through the special protection of the individual right to information in their case law. Accordingly, in circumstances of particular interest for the societies, the collective dimension of the right to know emerges under the umbrella of freedom of information, and justifies the claim for a state positive obligation to disclose.

3.2 The Duty to Disclose in Soft Law

A strong argument in favour of a positive obligation to disclose information is provided by the consistent international and regional soft law body of declarations, recommendations, guidelines, and reports. At the international level, the Human Rights Committee provides an authoritative interpretation of freedom of information provisions as entailing a corresponding state duty to provide state-held information. In its General Comment N° 34 on Article 19 ICCPR, the Committee calls for governments to proactively “put in the public domain government information of public interest”, and spells out the concrete duties that stem from the public right to access to information. According to the Committee, easy, prompt, and effective access to this information should be guaranteed by states, which are to adopt legislation and implement mechanisms and procedures to ensure that individuals have

their requests for information processed in a timely manner. Public authorities should be bound to expressly justify any denial to access; procedures for appeal and reconsideration of refusals should be established; and fees for processing requests should be sustainable and reasonable.³¹¹ Although the Comment - as a soft law document – is not binding in nature, it has already been widely used by both national and international bodies to indicate guidelines and gain support for arguing the duties of governments in protecting the right to information.

In a number of reports, the UN Special Rapporteurs on Freedom of Opinion and Expression have further contributed to outlining the state duty to disclose and provide public information at the international level. Already in 1998, the Special Rapporteur Abid Hussain expressed the view that the right to information entails “a positive obligation on States to ensure access to information, particularly with regard to information held by Government”.³¹² Building upon this statement, in the 2000 Report, after claiming the nature of access to information not merely as a freedom of information, but as “a right in and of itself”, the Special Rapporteur explicitly argued that “public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information”.³¹³ In complying with their obligations to respect and protect freedom of information, – so it goes the report –, governments shall therefore publicly and widely disseminate “documents of significant public interest”.³¹⁴ Subsequent reports confirmed this position.³¹⁵ Principles of transparency and good governance, essential to democratic systems, are used to rationalize the public right to information, and consequently the corresponding duty to provide and disclose it, in all these documents.

³¹¹ HRC, *General Comment No. 34: Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at: <http://www.refworld.org/docid/4ed34b562.html>, para. 19.

³¹² CHR, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 14.

³¹³ CHR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 18 January 2000, UN Doc. E/CN.4/2000/63, para.42-44.

³¹⁴ *Ibid.*, para. 44.

³¹⁵ *Inter alia*, the report of the Special Rapporteur, Ambeyi Ligabo, on implementing the right of access to information and protection and security of media professionals. 17 December 2004, UN Doc. E/CN.4/2005/64, para. 39. *Statement by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Media Freedom Representative, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information*, 6 December 2004, available at <http://www.osce.org/fom/38632>, at 2.

At the regional level, moreover, the bodies of the Inter-American system of human rights protection have contributed to the construction of a positive state obligation to provide and disclose public information with a considerable *corpus* of non-binding legal documents. Since 2003, OAS Office of the Special Rapporteur for Freedom of Expression has issued a number of reports and comprehensive studies, which have progressively defined the content and scope of the right to information and spelt out the positive state obligations that come with it.³¹⁶ In doing so, they have gradually elaborated a set of standards and criteria that push toward the recognition of a broad obligation to provide information in a proactive way. In 2010, these efforts have resulted in the adoption of a regional model law on access to public information, which aims to provide guidance to states on implementing legislation on the matter.³¹⁷ The *Model Law*, the elaboration of which was promoted by the OAS General Assembly,³¹⁸ claims to reflect the existing practice of states, and international and regional bodies in the Americas. It states in clear terms that even in the absence of a specific request, public authorities should disseminate information on a regular and proactive basis, and in a manner that assures the information is accessible and understandable to the public.

On the other regions, the European and African systems are progressively moving toward aligning their standards with the international ones. Although a state duty to proactively disclose and provide all information is not explicitly enshrined in binding documents, in effect, regional human rights bodies have been strengthening the content of the public right to have access to state-held information *via* interpretation of the existing norms. This process resulted in the elaboration of a number of declarations and good practices that encourage governments to proactively act in order to ensure that information of public interest circulates in the society.³¹⁹

³¹⁶ For an excursus of the OAS GA Reports on this subject see IACommHR, Office of the Special Rapporteur for Freedom of Expression. *El derecho de acceso a la información pública en las Américas: Estándares interamericanos y comparación de marcos legales*. 30 December 2012, OEA/Ser.L/V/II CIDH/RELE/INF.7/12, 1-2.

³¹⁷ OAS GA, *Model Inter-American Law on Access to Public Information*. 8 June 2010, AG/Res. 2607 (XL-O/10).

³¹⁸ OAS GA, *Access To Public Information: Strengthening Democracy*, 4 June 2009, AG/Res. 2514 (XXXIX-O/09), available at http://www.oas.org/dil/AG-RES_2514-2009_eng.pdf.

³¹⁹ The Parliamentary Assembly of the Council of Europe (PACE) issued a number of resolutions expressing support for the “Global Principles on National Security and the Right to Information”, which the

4. Standards and Principles of the Duty to Disclose

All the previously mentioned soft law instruments, besides contributing to the progressive emergence of a state obligation to disclose information, indicate standards, guidelines, and criteria that states should follow to comply with this obligation. Recently, at the regional level, human rights bodies have carried out some important work which gathers and summarizes international and national practice in order to draw up general guidelines and standards – such as the just mentioned Inter-American Model Law.³²⁰ These principles have been progressively adopted by institutions and bodies in their decisions. The legal basis, again, is the public right to access to information, enshrined in the provisions on freedom of information. In most of the documents, the rationales are principles of transparency, democracy, and good governance. Since these works tend to reflect the current trend in defining the contours of a duty to provide and disclose state-held information, both at the regional and at the international level, in what follows I will address the main principles that are common to the different documents in order to identify the main characteristics of such an emerging duty.

4.1 The Principle of maximum disclosure

The principle of maximum disclosure has been emerging as the key principle for a desirable legal regime regulating the public right to state-held information. It finds recognition in a number of resolutions issued by the Special Rapporteurs on Freedom of Expression,³²¹

Assembly considers reflecting “existing standards and good practices of states and international institutions”, and it calls on member states to implement those principles within their legal systems. The Principles, as we will see in the next section, clearly establish a state duty to proactively provide and disclose information. See, *inter alia*, PACE *Resolution 1954 (2013)* and *Resolution 2024 (2013)* for further references. Also, CoE, Committee of Ministers, *Recommendation on Access to Official Documents*, Rec(2002)2, 21 February 2002. In Africa, although the protection of the right to information at the national level is a rather serious reason of concern in the region, since very few countries have adopted access to information laws, the African Commission on Human and People Rights has taken several initiatives to allow state-held information to circulate among the public. See ACommHRP, *Declaration of Principles on Freedom of Expression in Africa*, 22 October 2002, available at: <http://www.refworld.org/docid/4753d3a40.html>; and *Model Law on Access to Information for Africa*, 12 April 2013, available at http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

³²⁰ *Supra*, fn. 317.

³²¹ See, for instance, UN, OSCE, and OAS Special Rapporteurs on freedom of expression, *Joint declaration on freedom of expression*, 6 December 2004, para 1. UN Sp. Rapp, 2005, para. 39. Also, the OAS Special Rapporteur on Freedom of Expression has recalled the principle of maximum disclosure in some country reports, to encourage states to align with international standards of protection of the public right to access information. See, OAS Sp. Rapp. On Freedom of Expression, *Report on Paraguay*, 2001, para. 30; *Report on Panama*, 2003.

international declarations,³²² and regional instruments.³²³ The Inter-American Court of Human Rights, on the legal basis of Article 13 ACHR (freedom of expression), applies and interprets this principle as an essential benchmark that must govern all the activities of state bodies in any democratic society.³²⁴ At the European level, although, as we have seen above, institutions have been more cautious in requiring full disclosure, there is a tendency developing to foster disclosure of public information.³²⁵

The principle of maximum disclosure entails the presumption that all the information held by public bodies is accessible to the public. In procedural terms, it creates a presumption of disclosure, which can be overcome only by a strict system of exceptions prescribed by the law. This determines the inversion of the burden of proof from the requester-citizen to the public information-holder, which has to demonstrate the legitimacy of any refusal of disclosure. This principle triggers a broad interpretation of the concepts and the actors involved in the process of disclosure. The concept of information, as stressed by the Human Rights Committee, should be understood as including any form of record in the hands of public authorities, regardless of the source and date of production.³²⁶ By the same token, all the public authorities - be it at the national, regional and local level - that are empowered to hold the state responsible for their acts should be encompassed in the concept of public bodies - as public information-holders.³²⁷

³²² Among other, see the *Brisbane Declaration* on the right to know, issued by UNESCO on 3 May 2010, in which the maximum disclosure is considered an “internationally recognized principle”. Available at <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/brisbane-declaration/>.

³²³ ACommHPR, *Declaration of Principles on Freedom of Expression*, approved on 19 October 2000, Art. 4. The African *Declaration on Freedom of Expression* limits the principle of maximum disclosure, intended as requiring a proactive obligation to disclose information even without an explicit request only in case of “important information of significant public interest”. IV, 2(4) ACommHPR, *Declaration of Principles on Freedom of Expression in Africa*, 22 October 2002, available at: <http://www.refworld.org/docid/4753d3a40.html>.

³²⁴ The Court embraces this principle for the first time in the above-discussed *Claude Reyes v. Chile*. IACtHR, *Claude Reyes et al. v. Chile*, para. 92. The same principle was reiterated few years later in the Gomes Lund judgment. IACtHR, *Case of Gomes Lund et al. v. Brazil*, para. 199.

³²⁵ The European Convention on Access to Official Documents, for instance, affirms that all information is, in principle, public. CoE, *Convention on Access to Official Documents*, Preamble, clause VII.

³²⁶ HRC, *General Comment No. 34*, para. 18.

³²⁷ *Ibid.*, para. 7.

4.2 Limits and exceptions

Since the right to access information - as derived from the provisions on freedom of information - is not an absolute right, restrictions to its content are, in principle, admissible. To be admissible, restrictions must meet the criteria of legality, legitimacy, and necessity. In other words, every restriction has to be expressly prescribed by law, serve a legitimate aim, and be necessary to achieve that aim. Each human rights system has listed a number of general exceptions that can justify a refusal to disclose. The most common ones are: national security; public order; public health; morals; and respect for other individuals' rights, honour, or reputation.³²⁸ Moreover, when one of these justifications exists, public authorities also have to prove the proportionality between the imposed restriction and the harm caused to the public or private interest receiving the information.

The list of exceptions that may justify restriction to public access to information, admittedly, is long and broadly interpretable. In general, governments have a margin of discretion in assessing the existence of one or more justifications. Nonetheless, the principle of maximum disclosure necessarily informs also the regime of restrictions, and has as a corollary that, in the case of information of public interest, restrictions must be limited. Furthermore, as I will argue further in the next paragraph, the proportionality test that restrictions are to meet to be legitimate proves particularly stringent in cases of information involving especially important issues for the public. In fact, in these cases, public authorities are to prove that the reason behind the restriction is so pressing as to justify the harm to the corresponding public interest in discussing matters of public concern (evidence of proportionality and principle of public interest override).³²⁹

4.3 Principle of public interest override

The principle of public interest override has been especially stressed in the case law. It determines that, when the information concerns matters that are important for the whole society – and therefore matters in which the society in general has a proper interest –, limitations should be carefully considered. As was addressed before in the chapter, many cases

³²⁸ These are the listed in Art. 19 ICCPR, and also reproduced with minor changes in Art. 13 ACHR. Art. 10 ECHR adds additional justifications to them, such as protection of confidential information, prevention of crimes, and impartiality of the judiciary.

³²⁹ IACtHR, *Claude Reyes et al. v. Chile*, para. 58, argument of the IACommHR. The principle of overriding public interest is also stated in the OAS *Model Inter-American Law on Access to Public Information*, para. 44, and in the African *Model Law on Access to Information*, Part III, para. 25(1).

in which human rights courts and bodies rejected restrictions to the public right to information are justified on the basis of the public nature of the information sought. Public information, in this sense, has been considered a public good.

This was the case, for instance, for data related to the use of the death penalty in the *Toktakunov v. Kyrgyzstan* decision that I considered above. Considering that such information was of general public concern and essential to the encouragement of an informed public debate on issues of public interest, the Committee stated that restrictions to this kind of information could not “be deemed necessary for the protection of national security or of public order (*ordre public*), public health or morals, or for respect of the rights or reputations of others”, unless public authorities can demonstrate the opposite.³³⁰ Similarly, in the above mentioned *Társaság a Szabadságjogokért v. Hungary*, the European Court of Human Rights considered that the obstacle put in the path of access to information related to a MP’s complaint on drug-related legislation by the Hungarian Constitutional Court jeopardized the interest of the society in receiving information on matters of public relevance, notwithstanding the counter-interest of the MP’s right to privacy. While the government’s interference complied with both the criteria of legality and legitimacy, the Court still deemed it unjustified since it negatively affected the possibility of the society to receive “accurate and reliable information”. The Court therefore concluded that the restriction was not “necessary in a democratic society”.³³¹ Generally speaking, therefore, it seems that the suppression of information of public interest is to meet a stricter test of admissibility in order to be justified.

5. Duty to disclose information concerning Gross Violations of Human Rights

The discussion above has sketched the contours of the state duty to disclose as derived from the legal framework of the public access to information in general. As we have seen in the previous analysis, public authorities must, in principle, provide information when a legitimate interest of the requester exists. Although transparency and good governance arguments necessitate that all the information should, in principle, be accessible (principle of maximum disclosure), restrictions to information are admissible when they are provided for by law, legitimate – corresponding to a specific, acceptable justification –, and necessary for the

³³⁰ HRC, *Toktakunov v. Kyrgyzstan*, para. 7.7.

³³¹ ECtHR, *Társaság a Szabadságjogokért v. Hungary*, paras. 35-39.

functioning of democratic society. On matters of general concern, however, public interest has primacy over legitimate restrictions to information. In such cases, there is a presumption of disclosure for the information that is relevant for the public. Public bodies must provide this kind of information when requested to do so, without the claimant needing to prove a direct interest or a personal involvement. In the American system, as well as in the comprehensive body of soft law, the obligation to provide requested information of public interest is coupled with a positive obligation to proactively disclose this kind of information, even in the absence of an explicit request. Moreover, for this kind of information, the proportionality test to assess the legality of restrictions on information of public interest should be interpreted narrowly.

In the case of gross violations of human rights, the right to access to information also offers a legal ground to hold the state to disclosing information concerning past abuses. As the UN Special Rapporteur notes in the 2013 Report, countries that have experienced gross and systematic violations in the past are especially concerned with the public demand to disclose information.³³² In these contexts, states are required to provide information on what happened not only to the victims and their families, but also to the whole society.³³³ As discussed above, the conceptualization of the right to access information concerning serious human rights violations – and therefore the corresponding state duty to disclose –, has mainly been constructed on the basis of the right to truth in its dual dimensions: the victims' right to know full and complete information about the facts on, circumstances of, and responsibilities in the events that constituted violations to their fundamental rights; and the collective right of the society to know what happened during a certain period of time in the community. In this dual dimension, hence, protection of access to information gives victims a clear legal basis to ground their claim for truth. At the same time, it protects the general interest of the society to know the truth about periods of its history that are particularly meaningful for its identity.³³⁴

Because of the specific features of these situations, however, the contours of the duty to disclose information in cases of gross human rights violations need some further

³³² UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013), para. 24.

³³³ *Ibid.*, para. 29. See also *Supra*, para. II.2.

³³⁴ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013), paras. 37-38.

specification.³³⁵ My argument is that, because information concerning grave and systematic human rights violations - especially those carried by state agents is of uttermost concern to the whole society, this kind of information should be treated with the highest level of priority according to the reinforced regime that applies to information of public interest. This means that, in line with the developments in human rights law, in these situations public authorities should disclose information even without any specific request for disclosure.

The case-law of international human rights bodies supports this line of argumentation. These bodies have particularly reinforced the presumption of disclosure for the documentation related to mass human rights violations, and thus charged the state with a burden of proving the legitimacy of any restriction imposed on it.³³⁶ The stronger presumption of disclosure makes it more difficult for governments to limit access to this kind of information in these cases. This is because, while restrictions to state-held information, in line with the general principles, may be admissible when meeting the criteria of legitimacy, legality, and necessity, in the case of fundamental rights' violations in general, and those of particularly heinous nature in particular, it is highly unlikely that these criteria can be met.

In the discussion on the memory of past human rights violations, the legal regime of the duty to disclose in the case of gross human rights violations frames the discussion about the legitimacy of state-held secret archives and classified documents concerning the abuses. The relevance of this regime is evident given the fact that the main rationale that has been used to justify policies of classification and secrecy of state-held information concerning patterns of mass and systematic state-sponsored violence in state practice has been the protection of national security – itself a rather broad, and open to interpretation, concept. In these cases, the legal regime of access to information and the characteristics of the duty to disclose delineate the assessment of the legitimacy of this kind of state policies.

In cases of gross and systematic human rights abuses, the counter-values to be balanced against the government's interest of national security are victims' right to justice, reparation, and truth, as well as the general interest of societies to know what happened in

³³⁵ CHR, *Updated Set of Principles to Combat Impunity*, Principle 4 and Principle 5.

³³⁶ See in this chapter, on the principle of maximum disclosure, *supra*, para. 4.1.

their countries and to obtain guarantees of non-repetition from the government.³³⁷ Principles of democracy and good governance, which entail transparency in the management of information, should also guide governments in adopting legislation to deal with their violent past, opposing national policies of secrecy. Human rights bodies have been determined in promoting these values over national security claims. In the above mentioned report of 2013, the UN Special Rapporteur asserted that, in relation to violations that took place in the past - especially when committed by previous regimes -, the national security argument has “little credibility”.³³⁸ Similarly, with regard to classification of information concealed during previous regimes, the European Court of Human Rights, dealing with a lustration proceeding in *Turek v. Slovakia*, stated that restrictions to access materials that were classified as confidential under previous regimes could not be justified on the basis of a “continuing and actual public interest” in keeping that information secret, since that interest could not be assumed.

The Inter-American Court of Human Rights addressed this issue comprehensively in *Gomes Lund et al. v. Brazil*. The case concerned the question of the legitimacy of amnesty laws that shield those responsible for serious crimes committed during authoritarian regimes from prosecution.³³⁹ Following its previous jurisprudence, the Court declared the 1979 Brazilian amnesty law incompatible with the American Convention.³⁴⁰ The Court found that the denial of, and delay in providing information to the victims and their relatives by the public authority constituted a violation of article 13. Interestingly, this violation, according to the Court, amounted to an infringement of the victim’s right to the truth.

An *Amicus Curiae* brief on the right to truth and access to information, submitted to the Court by a group of human rights organizations led by the Open Society Justice Initiative, suggested that, in the case of gross and systematic human rights abuses, a “human rights super

³³⁷ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013), para. 36. The same position on that issue has been shared also by the IACommHR in various reports adopted since 1985. IACommHR, *Annual Report*, 1985-86, OAS/Ser.L/V/II.83, 193 and following reports. Also, OAS, *Recommendations on Access to Information*, OEA/Ser.G/CP/CAJP-2599/08, 21 April 2008, IV. B.

³³⁸ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013), para. 55.

³³⁹ The IACtHR had already addressed this issue before in previous decisions. See *Barrios Altos v. Peru*, Merits, and *Almonacid-Arellano v. Chile*.

³⁴⁰ *Gomes Lund et al. v. Brazil*, paras. 174, 180 and operative para. 3.

access clause” should apply. This clause would provide an interpretation of the content of the right to information which would entail that access to documents concerning serious human rights breaches requested by victims or their relatives should not be subject to any kind of restriction.³⁴¹ The brief puts forth this argument on the basis of the analysis of national legislations on freedom of information in the American region, as well as the OAS Model Law on Access to Public Information’s provisions. In spite of the convincing reasoning articulated in the brief, the Court did not embrace this interpretation, and instead confirmed the admissibility of restrictions to the right to access to public information.³⁴² Nonetheless, it significantly declared that neither classified information and state secrets nor limitations, such as reasons of public order or national security, can be used by public authorities as a means of refusing to disclose information related to human rights breaches.³⁴³ This standpoint is in line with the growing body of soft law that I considered above.³⁴⁴ Indeed, all those non-binding documents strongly oppose the possibility of imposing secrecy on information involving serious human rights violations, and require that, with regard to information related to such abuses, exceptions should not be admitted.³⁴⁵

In the light of these trends, it is reasonable to assume that when states are responsible for serious human rights violations, legitimate restrictions on relevant information are hardly conceivable in the current international framework of human rights protection. While not

³⁴¹ Open Society Justice Initiative et al.. Amicus Curiae. Submission in the Case of Gomes Lund and Others v. Brazil. A Submission to the Inter-American Court of Human Rights. June 2010, available at: http://www.right2info.org/resources/publications/briefs/gomes-lund_amicus_eng.

³⁴² The Court nonetheless applies the maximum disclosure principle, from which it derives the obligation for the state to justify any restriction to information, to provide effective mechanisms to request and have access to public-held documents, and to appeal against a refusal. Moreover, it requires the state to carry out a narrow interpretation of the admissible limits to the right to access. IACtHR, *Gomes Lund et al. v. Brazil*, paras 197 – 200; 229 – 231.

³⁴³ *Ibid.*, para. 202. This position had been already upheld by the Court in the *Myrna Mack Chang* decision. *Myrna Mack Chang v. Guatemala*, para. 180 – 182.

³⁴⁴ *Supra*, para. 3.2.

³⁴⁵ In fact, in those documents, there are clauses excluding the application of the exception regimes to access to information from the cases of serious human rights violations. The Human Rights Committee, for instance, has frequently expressed the view that, in the event of human rights violations committed on a large scale, state parties should make public all documents relating to these abuses. See, for instance, the *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013). Additionally, on the Inter-American system, see for instance IACommHR, Office of the Special Rapporteur for Freedom of Expression, *The Inter-American Legal Framework regarding the right to access to Information*, OEA Ser.L/V/II CIDH/RELE/INF. 1/09, 30 December 2009, available at: <http://www.cidh.org/relatoria>, 29-34.

absolute, the public right to access to information seems to require states to act with a higher degree of transparency and openness in disclosing information related to those abuses. It can therefore be argued that, with regard to information concerning past periods of systematic state violence, the duty to disclose information requires states to refrain from shielding documents concerning the past from the public eye. It therefore delegitimizes the creation of secret archives, and encourages governments to open the existing ones.

6. State Practice

From the previous analysis of the human rights instruments and case law, I inferred that, in the international law framework, a positive state obligation is progressively developing to allow access to information concerning gross human rights violations when requested, and to disclose this information to the public. The rationales beside this duty are the right to information – in the individual and collective dimension – and the general principles of democracy and good governance. These latter two, in particular, are derived from the protection of freedom of information. It entails that societies be informed about matters of general interest to fully exercise the citizens' rights and duties to participate in public life, and to exercise control over the work of public authorities. As argued, patterns of systematic abuses certainly fall into the category of information of public concern. On these arguments, classification policies directed to shield information concerning serious abuses from public scrutiny should be interpreted as contrary to international norms.

It should be assessed whether the development of this trend at the international level finds a correspondence in national practice. With regard to the state duty to disclose the results of investigations and make findings public, I already discussed the role of truth commissions and truth-seeking mechanisms.³⁴⁶ In this regard, it is interesting to remark that the final reports of these bodies generally require governments to disseminate the final account of the investigations as widely as possible through media and public information mechanisms. States have generally deemed this request binding, and have therefore generally provided for the publication and dissemination of the final reports. Apart from this, another form of state practice should be considered as an example of the connections between the state duty to disclose information of public interest under international law, and national processes of

³⁴⁶ *Supra*, Ch. II.

memory making. This practice involves the open policies on classified files concerning serious human rights abuses committed in the past.

At the domestic level, the public right to access information, as grounding a state duty to disclose, has provided justification for governments reckoning with an abusive past to adopt declassification policies of secret information related to the period of violations. Post-communist countries were pioneers of this practice. Since the nineties, Hungary, Czech Republic, Bulgaria, Poland, Romania, Estonia, Latvia, and Lithuania have adopted legislation which has progressively opened up most of the secret archives of the previous communist regimes.³⁴⁷ The Latin-American countries – also in the light of the proactive approach adopted by OAS bodies - have incorporated a state duty to disclose information about patterns of serious human rights violations committed in the past in the national access regulations. In fact, most of the access laws of these countries include clauses that prohibit restrictions to information concerning cases of gross human rights violations. The Mexican Federal Act on Transparency and Access to Official Information (*Lei Federal de Transparencia y Acceso a la Información Pública Gubernamental*) explicitly prohibits the classification of information related to serious breaches.³⁴⁸ The Access to Public Information Laws of Peru and Guatemala also include provisions that enshrine the principle of maximum disclosure for information concerning serious violations.³⁴⁹ Likewise, the Brazilian legal framework on access to information, recently revised, rules that no limitation can be imposed on documents related to human rights violations committed by state agents.³⁵⁰ As a result of this trend, many countries

³⁴⁷ Stan and Nedelsky, eds., *Encyclopedia of Transitional Justice*, 1. For a broader overview of this practice in post-communist countries, see Stan, L., “Truth Commissions in Post-Communism: The Overlooked Solution?” *The Open Political Science Journal* 2 (2009): 1-13. See also the analysis performed by the European Commission in 2010 on the memory of crimes of totalitarian regimes in European Member States. Closa Montero, C., *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States* (European Commission, JLS/2008/C4/006: 2010).

³⁴⁸ Federal Act on Transparency and Access to Official Information, published in the Official Journal, 11 July 2002, last reformed on 6 June 2006, DOF 06-06-2006, Article 14.6, available at: <http://transparencia.senado.gob.mx>.

³⁴⁹ Peru: Transparency and Access to Public Information Act No. 27806, Article 15, available at <http://www.bcrp.gob.pe/transparencia/normas-legales/ley-detransparencia-y-acceso-a-la-informacion-publica.html>; Guatemala: Law on Access to Public Information, Congressional Decree No. 57-2008, Article 24, available at: <http://www.scspr.gob.gt/docs/infpublic.pdf>.

³⁵⁰ Law nº 12.527, 18 November 2011, Art. 21, available at: http://www.planalto.gov.br/ccivil_03/Ato2011-2014/2011/Lei/L12527.htm#art47. This, of course, raises

in the region have progressively disclosed many pieces of information on the years of dictatorships, authoritarianisms, and state-sponsored violence, which are now available to the public through the creation of public archives.³⁵¹

This state practice supports the emergence of the duty to disclose in human rights law. Nevertheless, when looking specifically at the single pieces of legislation on access to secret files and their implementation in practice, one can see that there are still many steps to be taken before the gap between, on the one hand, the theoretical recognition of such a duty in international and domestic legal instruments, and, on the other hand, its concrete fulfilment in practice, is closed. In the Eastern European landscape, for instance, most of the national access laws still include important restrictions to access to information concerning secret documents of the State Security and the Intelligence Services during the communist regimes.³⁵² These provisions often vest citizens only with the right to access personal files. Hence, a general right to access information for the public is disregarded. Requesters can access information which does not directly concern her or him only if a specific interest is proven.³⁵³ However, even in the latter case, the documents actually disclosed to professional historians and researchers upon request are often selected and evaluated by the public authority.³⁵⁴ Moreover, since the concept of national security is never specified by law, public authorities have an important degree of discretion in according access to those files.³⁵⁵ In practical terms, furthermore, most of these legislations entrust *ad hoc* bodies with the task of processing requests for access. Although these bodies are formally independent from political parties, in

delicate issues about the balance between this absolute right to access to information on human rights abuses committed by state agents and the individual right to privacy.

³⁵¹ On the state practice on human rights archives, see *infra*, Ch. IV.

³⁵² A good summary of the problem of declassification of state secret documents in Eastern Europe can be found in Mink, G. "Institutions of National Memory in Post-Communist Europe: From Transitional Justice to Political Uses of Biographies (1989–2010)" in *History, Memory and Politics in Central and Eastern Europe*, eds. Mink, G. and Neumayer, L. (Houndmills: Palgrave Macmillan, 2013), 155-170. For an overview of Access to Information Laws of Eastern-European Countries, see the European Commission, "Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States." See also Stan, *Transitional Justice in Post-Communist Romania*, 58-83.

³⁵³ For instance, see the *Bulgarian Act on Access to and Disclosure of the Documents and Announcing Affiliation of Bulgarian Citizens with the State Security Service and the Intelligence Services of the Bulgarian National Army*. Prom. SG. 102/19 December 2006, Art. 31.

³⁵⁴ Poland, 2006, Art. 36.

³⁵⁵ *Bulgarian Act on Access to and Disclosure of the Documents*, *supra* fn. 353 Art. 32. This article mentions, in even more general terms, the "interest of the Republic" as limitation for disclosure.

some cases big scandals exploded due to the political involvement of their functionaries.³⁵⁶ These practical obstacles clearly hinder the effectiveness of a general disclosure of information of public concern. From the point of view of memory-processes, moreover, in limiting the flow of information on traumatic events from the past within the society, they influence a direct or indirect alteration in the creation of memory narratives concerning those events.

The case of Romania, through the analysis provided by Lavinia Stan, offers a good example of how, in spite of the formal opening up of the secret archives of the communist regime, the management of secret files has altered the collective process of representing the past within the society. Stan provides an overview of the political and legislative steps that were taken in the country to declassify documents owned by the secret political police – the Securitate - during the years of the authoritarian rule.³⁵⁷ Since 1999, when Law 187 first opened the Securitate files for citizens, the disclosure process of secret documents had an alternative fate.³⁵⁸ Despite the formal opening up of secret files by Law 187/99, Romanian legislation actually did not bring about full disclosure. According to the legal framework set up by Law 187/99, access to secret files is granted to all the Romanians and EU citizens upon request, but is limited only to personal files. Other specific categories of individuals, which in the human rights language could be grouped as those exercising “a special watchdog function” or specific public functions, can also have access to information of public interest concerning individuals who are – or aim to be – in charge of high political and civil positions in the society.³⁵⁹ Researchers and professional historians can access documents through formal request, but the relevance of their application and the proportionality between the research interest and the requested materials have to be assessed and validated.³⁶⁰ Although legislative proposals aimed at broadening the scope of accessible material have been put forth, some files still remain closed and classified. Requests for access to documents that are classified as

³⁵⁶ Stan, L., “The Politics of Memory in Post-Communist Europe: A Comparative Analysis”, *Expériences et mémoire. Partager en français la diversité du monde. Colloquim*. Bucharest (2006).

³⁵⁷ Stan, *Transitional Justice in Post-Communist Romania*, 58-59.

³⁵⁸ *Ibid.*

³⁵⁹ Law on Individual Access to One's own Files and on the Disclosure of the Securitate as a Political Police, 187/99, Art. 2.

³⁶⁰ *Ibid.* Art. 19.

dangerous for the national interest are to be validated by the managing institution,³⁶¹ together with the national information services and the competent political authorities. This process clearly involves a highly political assessment.³⁶² Moreover, Stan argues that the inconsistent practical management of files by the responsible institution and the political interferences with its work not only have made the effective access to files difficult, but have also undermined the public trust in the whole disclosure process.³⁶³

These pitfalls in the process of disclosure of secret information by the Romanian government have clearly had an impact on shaping collective memories in the country. Stan observes this impact on the memory processes. She notes that the use of the political police secret files determined the creation of different narratives, both before and after they became accessible. As long as the files remained secrets, the history of the communist regime could be told and interpreted as the story of the personal dictatorship of Ceausescu. Former collaborators were presented as victims of the regime, and systematic human rights violations were told as episodic excesses. The narrative of the great nation was presented to strengthen the nationalist soul of the country, and to grant legitimacy to the new leadership. Even after Ceausescu's fall, the secret files were used as powerful political tools against the parties of the opposition. Therefore, no incentive existed for the new leadership to pierce the veil of silence over those documents.³⁶⁴ The author notes that, with the progressive disclosure of secret information, a greater flow of information came to the scrutiny of the public, challenging past narratives. She argues that the flaws in the process of disclosure have, however, caused the circulating of new partial and bias narratives within the society. The partial reading of individual files by victims stimulated the creation of personal narratives that could not be contrasted by collective memories, because of the limitations to access information for the general public. Furthermore, the lack of credibility of the managing institution in reading and disclosing the secret files, made other categories of individuals who had better access to the files – such as journalists, media agents, civil society actors, but also politicians – authoritative voices in the constructing of historical narratives. This experience makes apparent, I believe, the manner in which management of information translates into management of narratives,

³⁶¹ The National Council for the Study of Securitate Archives, established by Art. Law 187/99, Art. 7.

³⁶² See the analysis carried on by Stan, *Transitional Justice in Post-Communist Romania*, 70-75.

³⁶³ *Ibid.*, 72-75.

³⁶⁴ *Ibid.*, 58-83.

and thereby of memories. Hence, principles of law informing state policies on information management clearly influence the management of memories.

Concluding remarks

The chapter explored the state duty to disclose information concerning past gross violations of human rights committed on a large scale. This duty was firstly investigated in its legal dimension; access to information was considered the main legal basis from which the duty to disclose was inferred. Access to information pertains to both victims and society, at different levels. While in the former case, the right to the truth requires states to provide personal information related to the facts that led to the infringement of individual fundamental rights, in the latter case there is a presumption that societies have a legitimate special interest in knowing information on patterns of systematic violence in which state agents were involved. As a consequence, states should have a positive obligation not to interfere with the circulation of such information within the society and to provide requested information, as well as to promote its disclosure through open policies on state-held documents and secret files. Human rights bodies have strengthened the protection of access to this kind of information for special categories of individuals who play a “social watchdog role” within the society. In doing so, they enable this information to circulate within the society, therefore complying with the public right to know.

From the review of the main legal instruments and the practice of the Human Rights Committee, and the European and Inter-American Courts of Human Rights, however, it results that a positive state obligation to proactively disclose all information is not yet consistently established in international law. While the Inter-American system has clearly developed a practice supporting it, the European Court is still more cautious in recognizing such a positive obligation on states. Nevertheless, there is a clear trend toward the recognition of the duty to disclose at least with regard to information of particular importance for the public. Information related to gross human rights violations committed in the past is to be considered to fall into this category. This trend is supported by a consistent body of soft law. In these cases, the principles of maximum disclosure and public interest override define the contours of the state duty to disclose. As a consequence, restrictions to information concerning serious human rights violations are hardly ever admissible. These principles and standards have been

progressively confirmed by the case law of human rights bodies as well, and also found support in emerging state practice, albeit not without difficulties.

When the information to be disclosed relates to documents concerning past atrocities, however, imposing a state duty to disclose as an obligation under international law may have problematic outcomes. In fact, the reviewed state practice has shown how, in spite of open policies to disclose classified information concerning past crimes, the management of information regarding traumatic events occurred in the past still remains challenging. Open access to historical documents has an impact on how collective and individual narratives form and circulate, and therefore on how history is read and memory is shaped. At the same time, moreover, the existence of a duty to disclose under international law, through the elaboration and promotion of principles and standards, be it by enforceable instruments (judicial decisions) or less binding measures (soft law declarations and documents), may provide an obstacle for governments in the exercising of political selection of information on the past. In doing so, it may facilitate the creation – or protection – of a democratic and pluralistic network of individual and collective narratives that bloom and circulate in the society. In this way, international law, by means of the regulation of the duty to disclose, may act on two different levels: First, it may provide guidelines for states on how to relate to the records of an abusive past; and second, it may protect the societal ownership of the memory-negotiation processes from the control of the political leadership. From this perspective, international law may thusly act as that facilitator of memory which I presented at the outset of this dissertation.

Chapter IV

The Duty to Preserve Memory

Introduction

The first domain in which international and human rights law provisions interfere with the processes of memory making is the production and dissemination of information about the past. In the previous chapters, I have examined how human rights law requires states, first, to inquiry about, and clarify the past when marked by events which constitute serious offences to fundamental rights (through the obligation to investigate, chapter II), and second, to ensure that the information emerging from those investigations is made accessible to victims and society (through the right to access to information and the corresponding emerging duty to disclose, chapter III). In this way, the law regulates the production of, and access to knowledge about the past. The duties examined so far – the duty to ascertain the historical facts constituting human rights violations and the duty to disclose information related to those violations –, by the way they are regulated under human rights law and the way they have been implemented in practice, eventually influence how history is interpreted and the past is represented, and thereby impact on how individual and collective memories shape and circulate.

The next step that international law encourages states to take when dealing with mass atrocities in the past is to collect and preserve items – documents and other kinds of records – related to past violations from the passage of time. To do so, states are expected to create archives and collections, which in fact result in storages of memories. This practice points at the next duty that influences the production and dissemination of knowledge of the past, which will be discussed in this chapter: The duty to collect and preserve documents and records related to past violations. As in the previous chapters, this chapter explores the contours, content, and standards of the duty under scrutiny, and highlights its relevance for the processes of memory-making. Unlike in the previous chapters, however, the chapter will not analyse the legal foundation of the duty at issue in depth, as it was done for the previous components of the duty of memory. This is because the duty to collect and preserve information mostly shares its legal foundation with the legal grounds of the duty to disclose. The right to access to

information, which I have discussed at length in the previous chapter, is in fact the primary basis on which the duty to collect and preserve has been argued, both in the conceptualization of the right to know and as instrumental to the protection of other individual rights. Since these legal grounds have already been discussed previously in the thesis, I will not specifically address them again here, but I will limit myself to recalling the analysis conducted in the previous pages.³⁶⁵

Hence, in what follows, I will mainly focus on recollecting and systematizing the relevant practice that supports the emergence of such a duty. In the analysis of the practice, nevertheless, the different conceptualizations will be highlighted that have been used by the different international legal actors to frame and theorize such a duty. At the same time, I will indicate major standards and guidelines elaborated in the practice that influence how memories of the past are produced and delivered. The chapter therefore opens with a discussion about the relevance of the duty to preserve for the processes of memory-making. In this part, I first present a reflection on the role of archives – as the main expression of the duty to preserve - in the processes of memory-making, and then I sketch the theoretical framework to conceptualize the emerging duty to preserve. The second part of the chapter reviews and systematizes the practice of international bodies and states, in order to assess the state of the art of the duty to preserve in the international system. Finally, the last part indicates guidelines and principles that emerge from the analysis of the practice, and that offer insights about the concrete implementation of the duty.

1. Memory and the Duty to Preserve

1.1 The Role of Archives

Human rights archives are the main expression of the state duty to collect and preserve documents in situations of mass and widespread violence.³⁶⁶ These institutions become “sites

³⁶⁵ *Supra*, Ch. III, para. 2.

³⁶⁶ Human rights archives are a specific category of archives which collect and document evidence related to human rights abuses. One of the most fruitful scholars writing on this theme is certainly Louis Bickford. See “The Archival Imperative: Human Rights and Historical Memory in Latin America's Southern Cone”, *Human Rights Quarterly*, 21 no.4 (1999): 1097-1122; “Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay”, *Latin American Research Review* 35, no. 2 (2000):160-182. See also Cox, Richard, “Archives, War, and Memory: Building a Framework”, *Library & Archival Security* 25, no.1 (2012): 21-57.

of memory” for the custody of those records.³⁶⁷ It was said that “[a]rchives are repositories of memory, providing reliable evidence for examining the past.”³⁶⁸ They are established to enable a systematic recollection of the different narratives that come to be the bigger story of violence. As Margalit puts it, they are vehicles for memories travelling from a person to another, enabling the construction of shared memory.³⁶⁹ Human rights archives, preserving evidence and traces of human rights abuses, aim to defend the stories they tell from the passage of time. They create a bridge between past and future, ensuring that those stories can be read also by the next generations. Beyond that, they try to provide an account – “some sense of the truth” – for something that “very often seems (...) meaningless”.³⁷⁰ Historians often rely on their collections to shape the historical account they will present. Judges and courts often rely on their databases to clarify historical events which are relevant for their decisions.³⁷¹ Journalists often rely on the information they store to tell stories about the past and disseminate them in the public opinion. They are therefore sources of collective memories.

Yet, archives are selective. The questions of which records to include and which ones to destroy, and – even before that – who makes that decision, determine which stories are told and how they are shaped. The way documents related to past abuses are managed – selected, collected, processed, stored, and preserved – in archives influences how those traumatic events will be remembered by future generations, when no direct witness will be able to tell them anymore. The official management of archives on human rights abuses, hence, may allow governments to shape official narrative to be circulated in the society. Archives, in this sense, are instruments in the hands of governments for manipulating how the past is read and

³⁶⁷ Nora, “Between memory and history: Les lieux de mémoire”, 127-24. To Nora, sites of memory are *lieux de mémoire* “where memory crystallizes and secretes itself”; as such, they are opposed to *milieux de mémoire*, which are, instead “real environments of memory” (ibid., at 7). See also Winter, *Sites of memory, sites of mourning*.

³⁶⁸ Jimerson, R., “Archives and memory”, *OCLC Systems & Services: International digital library perspectives* 19, no. 3 (2003): 89 – 95.

³⁶⁹ Margalit, *The Ethics of Memory*, 63.

³⁷⁰ Cox, “Archives, War, and Memory”, 22.

³⁷¹ See, for instance, the role of truth commissions’ archives in the decisions of the Inter-American Court of Human Rights. E.g. IACtHR, *Myrna Mack Chang v. Guatemala*, paras. 134.8-134-17; *Castro Castro Prison v. Peru*.

represented. Archival policies have been crucial, in fact, in the political agenda of undemocratic regimes. By the same token, destruction of archives – because of their strong identity component - has long been used as weapon in warfare, especially in ethnic conflicts. As it was noted,

[the destruction of archives in war] is not “collateral damage.” This is the *active* and often systematic destruction of particular building types or architectural traditions that happens in conflicts where the erasure of the memories, history and identity attached to architecture and place—enforced forgetting—is the goal itself. These buildings are attacked not because they are in the path of a military objective: to their destroyers they *are* the objective.³⁷²

Taking into account all these aspects, the crucial role of archives in shaping the memory of the past should remain clear. As a consequence, international provisions and guidelines that influence and orient archival policies of states necessary alter the relation between a state and its past. In light of this strict connection between the management of historical documents in archives and the production of collective memories, the state duty to create archives and collections to document past human rights abuses has, in fact, been labelled the “duty to preserve memory”.³⁷³ This is also the label that I will use in this thesis to refer to such a duty. Indeed, when the documentation that states are asked to gather and store relates to historical periods of pervasive human rights abuses, the duty to collect and preserve information seems to require states to preserve and maintain materials that produce narratives about past atrocities. In this sense, the duty to preserve is a third component of the duty of memory under international law.

1.2 Duty to Preserve - Contours

The duty to gather and preserve documents and records has been implemented in different fields, including public administration management, access to personal information, regimes of criminal detention, internet regulation, etc. In all these domains, states bear the responsibility to implement storage and retrieval systems to collect and preserve relevant information. It has its roots in the right to know – in its individual and collective dimension –,

³⁷² Bevan, R., *The Destruction of Memory: Architecture at War*. (London: Reaktion Books, 2006) 8, quoted in Cox, “Archives, War, and Memory”, 24.

³⁷³ CHR, *Updated Set of Principles to Combat Impunity*, Principle 3. Similarly, the CoEs recommendation on access to archives recognizes that “[archives] preserve the memory of nations and the survival of human memory”. CoE, Committee of Ministers, *Recommendation on a European policy on access to archives*, Rec. (2000)13, 13 July 2000.

and entails the creation and management of databases, archives, and collections. Its main function consists in enabling individuals to effectively enjoy their civil and political rights during their physiological stage, i.e., in the normal phase of respect, protection, and fulfilment of those rights by states.³⁷⁴ However, when it comes to the pathological stage of human rights violations, the implementation of the duty to collect and preserve evidence of the abuses becomes especially important in enabling victims to protect and vindicate their rights. In fact, holding states responsible for collecting and maintaining evidences and materials related to human rights violations, in addition to the enforcement mechanisms of the right to access to documents, such as *habeas data*, effectively allows victims to get to know relevant information about the violations they suffered, and therefore to access remedial proceedings to vindicate their rights.

Beyond this functional character, moreover, in patterns of systematic and serious human rights violations, the state duty to collect and preserve documents serves other goals. In these situations, in fact, archives are not only repository of information, but also sacred spaces which are crucial to the struggling social (or official) process of reconstruction of *one* truth.³⁷⁵ Also in these contexts, the individual and collective dimension should be acknowledged. From the victims' perspective, the individual right to access information about abuses suffered in the past would logically entail a corresponding state duty to gather and preserve documents and records related to those violations. In fact, if one admits that victims have a right to know the truth about what they suffered, and that this right also entails the victims' right to access information concerning the historical circumstances in which those violations occurred,³⁷⁶ the consequent state duty to collect, gather, and preserve documents in fact results in collecting and preserving records which give a (or *one*?) historical account of those violations, in order to ensure the effective enjoyment of the victims' right to know. The victims' right to information, hence, entails that states are responsible for managing evidence related to the violations, which

³⁷⁴ The concepts of "physiological" and "pathological" phases in international law is used by Professor Conforti to distinguish between norms applicable to the regime of state responsibility and primary norms. Conforti, B., *Diritto Internazionale*, (Napoli : Editoriale scientifica, 2002), Part VI. Lenzerini applies these concepts to the human rights discourse, to describe the violations to indigenous people's rights. Lenzerini, F., *Reparations for Indigenous Peoples* (New York: Oxford University Press 2008), 7.

³⁷⁵ Cox, "Archives, War, and Memory", 32.

³⁷⁶ CHR (OHCHR), *Study on the Right to the Truth*, para. 59. Similarly, IACHR, *Velásquez Rodríguez Case*, Merits, para. 177. Cfr. *supra*, Ch. II, para. 2.1.3.

will then become materials to reconstruct and represent the past. This, in turn, influences how that past is told and remembered.

On the other hand, in patterns of widespread violence, the theoretical conceptualization of the right to access information from the collective dimension of the right to know also adds more features to the state duty to gather and protect information of public interest. The creation of archives and collections that document mass human rights abuses serves the society's general interest of access to information of public importance, and members of the society in the verification of accounts of the periods of violence.³⁷⁷ From this perspective, hence, the duty to collect and preserve records becomes a tool for protecting the societal interest in getting to know information about historical events that are relevant for a people's history and identity. This is to say, in other words, that states not only have the duty to make information in their hands available and accessible (as it was argued in Chapter III), but they also bear the responsibility to collect and preserve records to allow those abuses to be represented and remembered.

2. The Practice

Both at the international and domestic level, the practice seems to support the emergence of a duty to preserve in the aftermath of serious and widespread human rights abuses. International and regional institutions and non-governmental bodies have repeatedly invoked the state duty to create archival systems to collect and preserve documents and information related to the violations that occurred in the past in both their statements and legal instruments. As a result, the guidelines developed at the international level have been implemented by governments dealing with past violence, which have adopted pieces of legislation for the creation of archives and collections on the periods of violence.³⁷⁸ In what follows, I will discuss the relevant practice, which have emerged at both the supranational (international and regional) and national level.

³⁷⁷ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2013), para. 19. On the collective dimension of the right to know see *supra*, Ch. III, para. 2.1.1.

³⁷⁸ See *infra* in this chapter, para. 2.2.

2.1 The duty to preserve in international practice

At the international level, a first recognition of the state duty to preserve archives in conventional provisions can be found in the Vienna Convention on State Succession in respect of State Property, Archives and Debts.³⁷⁹ Albeit limited to the scope of states' succession, the Convention affirms the state obligation to prevent damage to, and destruction of archives, in order to ensure the appropriate transfer of archives from the predecessor state to the successor state.³⁸⁰ Besides that, other provisions in the Convention suggest a general *favor* for preserving and maintaining the integrity and security of state archives.³⁸¹ It is important to note, moreover, the conceptual tie that the Convention draws between the management of archives and the people's right to information about their history and their cultural heritage. In this sense, the Convention sanctions the priority of the latter on inter-state agreements on archive succession.³⁸²

Besides this explicit (be it limited) recognition, the duty to preserve is not recognized, as such, in any binding human rights document. Yet, some of its features can be further deduced from international soft law instruments and practice. The Set of Principles to Combat Impunity, first and foremost, provides an enlightening contribution to this discussion, by explicitly asserting the existence of the duty to preserve documents and delineating its substantive scope. Principle 3 describes the "duty to preserve memory" as the state duty to "preserve archives and other evidence concerning violations of human rights and humanitarian law".³⁸³ The accompanying commentary bestows on this duty "universal relevance", although it does not further explain what this would concretely entail.³⁸⁴ In this framework, the duty to preserve memory is conceptualized as a corollary of the right to know. In line with the

³⁷⁹ *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, 8 April 1978, available at: <http://www.refworld.org/docid/3ae6b3961c.html>.

³⁸⁰ Art. 26.

³⁸¹ See, for instance, the provision on the preservation of the integral character of groups of State archives which, whilst not imposing any obligation on states, clearly suggests a *favor* for the preservation of the integrity of archives. Art. 25. See also the call for cooperation and collaboration between the states in reciprocally providing necessary documents and to recover dispersed archives. Artt. 27- 28.

³⁸² Artt. 28(7) and 31(4).

³⁸³ CHR, *Updated Set of Principles to Combat Impunity*, Principle 3.

³⁸⁴ *Ibid. Report*, para. 19.

theoretical conceptualization sketched above, while the legal basis suggested by the Principles is univocally the right to know *tout court*,³⁸⁵ the rationale they suggest is twofold. On the one hand, from the collective perspective, the duty to preserve memory aims at allowing violence-torn society to acknowledge the history of its oppression, as part of its heritage.³⁸⁶ On the other hand, from the victims' perspective, the preservation of evidence related to violations enables victims to exercise and vindicate several individual rights.³⁸⁷ Here again, the regulation of modalities for access to, and management of information on the past has a double impact: collective and individual. The double dimension of the duty to preserve records of past atrocities suggested by the Set of Principles to Combat Impunity, has been subsequently upheld in reports and resolutions issued by international human rights bodies, which have further contributed to identifying its legal grounds and defining its content.

Also within the practice of human rights bodies, the duty to preserve has been presented in different conceptualizations. In the UN system, for the most part, the discussion on archives and the duty to create and preserve them is included in the debate on the right to truth. The Human Rights Council, for instance, has encouraged states “that have not yet done so to establish a national archival policy that ensures that all archives pertaining to human rights are preserved and protected, and to enact legislation that declares that the nation’s documentary heritage is to be retained and preserved, and creates the framework for managing State records from their creation to destruction or preservation”.³⁸⁸ This duty is seen as a corollary of the right to truth, which requires states “to take the necessary steps to preserve the collective memory of gross human rights violations”.³⁸⁹ Also in this conceptualization, the duty to preserve is intrinsically connected to the individual right to information – as “the fundamental right of each individual to have access to information on the public record relating to himself or herself” –³⁹⁰ as well as to the societal interest “to an undistorted written record, and the right of each people to know the truth about its past”.³⁹¹ In the light of this, the issue of the “[p]reservation of and access to archives on human rights violations and the

³⁸⁵ Ibid. Principle 14.

³⁸⁶ Ibid. Principle 3.

³⁸⁷ Ibid. Principle 15.

³⁸⁸ HRCouncil, *Resolution 21/7: Right to the Truth*, para 10.

³⁸⁹ HRCouncil, *Right to the Truth*, A/HRC/5/7, para 28.

³⁹⁰ Ibid., para. 58.

³⁹¹ Ibid., para. 60.

question of memory” has received the attention of the OHCHR in a number reports, which have provided further guidance for the implementation of the duty to preserve in national legislations.³⁹²

More conceptualizations have been provided beside the right-to-truth argument. The duty to collect and preserve records related to human rights violations has frequently been considered in the functional dimension that we highlighted above, namely as an instrument to enable individuals to exercise a number of primary rights.³⁹³ In this sense, international soft law instruments have also linked the state duty to collect and preserve documents concerning human rights violation to the victims’ right to an effective remedy with the obligation to investigate and prosecute. On the right to the truth, Resolution 2005/66 of the Commission on Human Rights stated that

States should preserve archives and other evidence concerning gross violations of human rights and serious violations of international humanitarian law to facilitate knowledge of such violations, to investigate allegations and to provide victims with access to an effective remedy in accordance with international law.³⁹⁴

The same wording has been restated in every subsequent resolution adopted by UN bodies related to the right to the truth.³⁹⁵ From this perspective, the preservation of memory – in the sense of keeping and maintaining records that enable narratives to be created and disseminated – is just a side effect of the duty to collect and preserve documents. Regionally, the duty to collect and preserve records has found further support in the practice of the Inter-American Commission for Human Rights. In this context, the previously mentioned Inter-American Framework on the right of access to information proves particularly relevant in the clarification of the roots, and content of such a duty, since it provides a detailed analysis of

³⁹² See, for instance, the recent report of the Special Rapporteur on Transitional Justice, Pablo de Greiff, (HRCouncil, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 28 August 2013. UN. Doc. A/HRC/24/42, paras. 80-88). See also the important OHCHR *Report on the seminar on experiences of archives as a means to guarantee the right to the truth*, 14 April 2011. UN. Doc. A/HRC/17/21. Also, HRCouncil, *Resolution 21/7: Right to the Truth*.

³⁹³ HRCouncil, *Right to Truth*, A/HRC/5/7, para 59: “[P]ublic rehabilitation of people convicted on political grounds, families’ rights to know where their missing relatives are, political prisoners’ right to amnesty and victims’ rights to reparation and compensation.”

³⁹⁴ CHR, *Human Rights Resolution 2005/66: Right to the Truth*, last Preamble Clause.

³⁹⁵ See, e.g., HRCouncil, *Resolution 9/11: Right to the Truth*. The same relation was also pointed out in the OAS GA Resolution AG/RES. 2175, (2006) and in its subsequent statements.

it.³⁹⁶ As we have seen in the previous chapter, that document aims at outlining the state of the art about the individuals' right to access to information in the Americas. In so doing, it also identifies guidelines and best practice to implement that right. In this framework, the duty to preserve and maintain records stems from two main obligations, which both fall on states from the individuals' right to information: i) the obligation to produce or gather the documentation that individuals require to have access to; and ii) the obligation to put in place implementing mechanisms to ensure the protection of the right to information.³⁹⁷ As it comes to the specific pattern of human rights abuses committed on a mass scale, the document further interprets the content of the victims' right to information as entailing a corresponding state obligation to create and preserve archives, and to facilitate access to them. The text could not have been more explicit in stating this duty, and its relation with the victims' right to know.

As a part of the right to information and its character as a tool necessary for guaranteeing knowledge of serious violations of human rights, the States also have the duty to create and preserve public archives designed to collect and organize information on gross violations of human rights that took place in their countries. The collection of this information, the creation of archives and their preservation are precisely State obligations derived from the right of access to information as an instrument to guarantee the rights of victims of gross violations of human rights.³⁹⁸

The Commission upheld such a duty in cases on access to information. In *Gomez Lund v. Brazil*, for instance, the Commission affirmed that the state had a "positive obligation to produce and conserve information", and therefore inferred the consequent obligation to implement measures to keep such information safe in archives and manage it there.³⁹⁹ In that case, Brazil claimed the destruction of documents and archives to justify their refusal to provide victims with information about the facts which led to the enforced disappearance of the victims and their fate. Moreover, it brought all the policies on archives and records management that the government had implemented in the years following the abuses before the Court, as evidence of its compliance with its obligations under the American Convention,

³⁹⁶ IACommHR, The Inter-American Legal Framework regarding the right to access to Information. See *Supra*, Ch. III, para 6.

³⁹⁷ IACommHR, The Inter-American Legal Framework regarding the right to access to Information, para. C.4(e), at 35 and C.4(f), at 41.

³⁹⁸ *Ibid.*, at 83.

³⁹⁹ IACtHR, *Case of Gomes Lund et al. v. Brazil*, para. 184, argument of the IACommHR: "States have the positive obligation to produce and conserve information, to which they are obligated to implement measures that permit the custody, management, and access to records or archives."

and, in particular, as a means of discharging its obligation to provide information. The Court showed appreciation for those policies, yet nonetheless dismissed the destruction of the required information as a legitimate justification for upholding the refusal. The Court considered that the state had to prove that it had undertaken “all the measures under its power” to keep the information in its hands, and warned the state to go further in the implementation of archival policies related to the period of grave human rights abuses in the country.⁴⁰⁰ Hence, the creation and appropriate management of archives and collections, in the Court’s reasoning, are modalities for the state to comply with its conventional obligations. In this way, the Court seems to suggest the responsibility of the state for the preservation of documents and materials about past events constituting human rights violations.

Even if more cautiously, also the European and African systems have concurrently upheld the responsibility of states in preserving and maintaining archives, especially those related to human rights violations. The African Commission, for instance, in its Model Law on Access to Information, included the duty of information-holders to create, keep, organize, and maintain information appropriately and efficiently, and to keep documents in good condition in order to guarantee their safety and integrity.⁴⁰¹ The European Convention on Access to Official Documents (ECAOD), similarly, includes the duty to efficiently manage documents and to regulate the modalities for their preservation and destruction among the “complementary measures” which states shall implement to give effect to the right of access to documents.⁴⁰²

Furthermore, the Committee of Ministers has taken on the task of developing principles and standards for guiding and harmonizing archival policies in the Member States.⁴⁰³ Recommendation n. R(2000)13 marks a milestone in the European archival policy. It

⁴⁰⁰ Ibid., para. 211.

⁴⁰¹ ACommHPR, *Model Law on Access to Information for Africa*, Part II, para. 6.

⁴⁰² CoE, *Convention on Access to Official Documents*. Article 9.

⁴⁰³ E.g., in July 2000, the Committee of Ministers adopted *Recommendation no. R(2000)13* on a European policy on access to archives. The Recommendation stressed the importance of archives, and set out the principles for archival policies to be implemented at the regional level. These principles were then embodied in subsequent draft recommendations prepared by the Group of Specialists on access to official information (DH-S-AC), which requires public authorities – *inter alia* – to manage archives efficiently, so as to ensure access to documents they store, and to apply clear and established rules for preservation and destruction of their documents. DH-S-AC(2001)004 and (2000)7.

endorses the right to access to archives and sets out minimum standards that member states should meet in their archival legislations. Moreover, it is worth noting that Recommendation R(2000)13 mainly approaches the right to access to archives, and the consequent duty to preserve documents stored therein, from the collective perspective. After affirming that archives “ensure the survival of human memory” and that they “preserve the memory of nations”, the Recommendation grounds the duty to protect and manage archives on the need to foster a European identity through the protection of memory. In these terms, it recalls the public interests in knowing history and historical research. On these grounds, member states are encouraged to allocate appropriate human and financial resources for the creation and maintenance of effective and efficient systems of preservation and management of archives. Governments should ensure the proper physical conservation of documents stored in historical archives, so as to allow the public the exercising of its right to access them. Hence, in these terms, the duty to preserve memory requires that states ensure the physical integrity of records about the past. In these regional systems, however, none of the adjudicatory bodies have enforced such a duty yet.

2.2 The duty to preserve in state practice

So far, we have endorsed the recognition of the emerging duty to gather and preserve records in the international and regional systems of human rights protection, mostly in soft law documents. As we have seen, soft law provides an argument in favour of such a duty, and indicates the right to know – through the enforceable right to access to information - as a legal basis to support it. However, since most of the previously examined soft law instruments – by definition - are not binding, their statements *per se* would not be sufficient to assert the existence of a duty to preserve records under international and human rights law.⁴⁰⁴ Nevertheless, the principles they reflect have been widely supported by state practice, developed especially by governments that are undergoing transitional processes to democracy

⁴⁰⁴ For a discussion on the legal significance of soft law, as non-binding rules in the evolution of human rights norms, see Guzman, A. and Meyer, T., “International Soft Law”, *The Journal of Legal Analysis* 2, no.1, (2010): 171-225. The authors point out that non-binding norms often guide tribunals in interpreting and applying binding legal obligation. In doing so, when the non-binding norm enters into a judicial decision, it becomes binding for the parties to the case (if the tribunal has the mandate to enforce its decisions). Beyond that, moreover, the non-binding norm referred to by decisions of international judicial bodies, also affects the broader perception of states – not only those affected by the decision - of what conduct is considered compliant with the binding rules. “Compliance with nonbinding norms and decisions, in other words, becomes one guidepost for states to use in assessing whether future behavior is compliant with the underlying legal rules.” See further references *supra*, fn. 24.

or as a result of the work of truth commissions. Most of the countries that have implemented de-classification policies of documents related to past authoritarian regimes that I have presented in the previous chapter, for instance, put in place legal, as well as administrative, procedures in order to collect and store that information. As we observed when we examined that trend, those countries included the state duty not only to provide access to documents, but also to ensure and preserve their integrity over time, in their access to information laws.

This practice is also wide-spread on the Latin-American continent. Over the last two decades, governments have increasingly developed their archival legislations, strengthening the importance of human rights archives which document the periods of violence. Brazil, for instance, has put forward a set of initiatives aimed at preserving and strengthening the national archival system, especially with regard to records related to the period of military dictatorship.⁴⁰⁵ Not by chance, this legislative and administrative process arrived in the country almost at the same time as the process of de-classification.⁴⁰⁶ After the work carried out by the Special Commission on Political Deaths and Disappearances, the Commission on the Archive on the Struggle against Dictatorship (*Comissão do Acervo da Luta Contra a Ditadura*) was established in 1999 under the supervision of the Secretary for Culture and Historical Archives. The Commission was established for the purpose of creating a historical collection of materials related to the violations committed in the region during the 1964 – 1985 timeframe.⁴⁰⁷ Since then, the government has enacted decisions that led to the progressive compilation of a large documental heritage of material on that tragic period. Ultimately, in 2009, the Reference Center for the Political Struggles in Brazil was created within the project *Memórias Reveladas*, to provide coordination and supervision of the record-keeping process.⁴⁰⁸ The project aimed, *inter alia*, at creating an online databank in which digitalized documents and records have been made accessible to the public. The majority of

⁴⁰⁵ For an interesting analysis of the memory policies adopted by the Brazilian government between 2000 and 2010 see Schneider, N., “Breaking the ‘Silence’ of the Military Regime: New Politics of Memory in Brazil”. *Bulletin of Latin American Research* 30, no.2 (2011): 198–212.

⁴⁰⁶ Established by Decree n° 40.318, 28 September 2000.

⁴⁰⁷ Rio Grande Do Sul Government, Decree n.º 39.680, August 24, 1999.

⁴⁰⁸ *Portaria* n. 204, 13 May 2009. The First and Second Preambular clauses of the document explain the rationale for creating the *Memórias Reveladas* project on the basis of the right to information and the “fundamental right to memory”.

the Federal States, as well as the Federal District, have contributed their public archives to the project.⁴⁰⁹ These archives and collections have played a crucial role in putting together and reading the history of the former authoritarian regime, and in the endeavour of making sense of the experience of violence. Many other governments in the region have progressively adopted comparable record-keeping policies with the same aim.⁴¹⁰

As in the case of Brazil, pieces of legislation that prescribe the collection and preservation of records of past abuses have been often coupled with the creation of *ad hoc* bodies in charge of managing the relevant documentation. In their statutes, these bodies are always somehow entrusted with the management and preservation of ‘memory’, and therefore involved in the organization and coordination of memory-related initiatives. The Polish Institute of National Remembrance (IPN) is a good example of this kind of memory-related institution. The institute was established by the government in 1998, with the founding goal to protect the memory of the crimes committed during WWII and post-war period in the country.⁴¹¹ It operates from the moral and political assumption that state-sponsored human rights violations cannot be withheld or forgotten, and it was created to fulfil the state’s obligations to prosecute state crimes and to heal victims’ harms. The IPN is in charge of collecting, securing, storing, disclosing, and disseminating the documentation regarding crimes committed in the period of the War, and during the subsequent regime of political repression.⁴¹² To that aim, an *ad hoc* department is responsible for managing and safekeeping archival records of that period. Similar to Poland, the Bulgarian Law for Access and Disclosure of Documents and Announcing Affiliation of Bulgarian Citizens to State Security and the Intelligence Services of the Bulgarian National Army⁴¹³ set up an oversight body in

⁴⁰⁹ See the Open Society Report, “Archives of State Security Service Records”, January 2013, available at http://www.right2info.org/resources/publications/publications_nat-sec_archives-of-state-security-service-records.

⁴¹⁰ See, for instance, the Argentinean National Memory Archive, which was created in compliance with the state duty – *inter alia* - to guarantee, respect, and protect the victims’ right to truth and justice, reparations, and rehabilitation. Decree N. 1259/2003, National Memory Archive, 16 December 2003, published in Official Journal, BO 17 of December 2003, Preamble, clause 2.

⁴¹¹ Polish Institute of National Remembrance. Mission. Available at: <http://ipn.gov.pl/en/about-the-institute/mission>. The same founding goal was established in the preamble of the 1998 law that created the Institute. Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, 18 December 1998, available in English at: http://www.ipn.gov.pl/portal/en/31/327/The_Act_on_the_Institute_of_National_Remembrance.htm

⁴¹² *Ibid.*, Art. 1.

⁴¹³ *Bulgarian Act on Access to and Disclosure of the Documents* (2006). *Supra*, fn. 353.

charge of searching, collecting, investigating, analysing, and evaluating that material. To comply with its responsibilities, the Committee decided to create a special archive to keep records of the communist experience. Similar bodies have been created in the majority of Eastern European countries dealing with authoritarian pasts.⁴¹⁴

To understand the relevance of this widespread state practice for the progressive affirmation of a legal duty to preserve memory, we should wonder to what extent this practice is also supported by some degree of *opinio juris*; that is to say, in other words, whether states adopt legal instruments to implement systems to preserve and safeguard records concerning human rights abuses with “a sense of legal obligation”.⁴¹⁵ In fact, most of the above-mentioned pieces of legislation – reflecting the state of the art in the international practice - anchor the need for creating and preserving archives not only in good practices, but also in genuine legal obligations on states, mainly rooted in the victims’ right to access to information, as a modality of their right to know or the right to truth.

In this regard, the Colombian case is emblematic. Article 57 of the Law on Justice and Peace (*Ley de Justicia y Paz*) states: “[t]he right to truth implies that archives are preserved”.⁴¹⁶ As a consequence, according to the law, public institutions are under the obligation to adopt measures to impede theft, destruction or falsification of archives, and to facilitate victims’ access to them in order that they may claim their rights.⁴¹⁷ The Constitutional Court of Colombia has further strengthened these principles, confirming the legal nature of this duty. Since 2003, the Court has recognized the obligation of every public body to adopt public policies to safeguard and preserve information, arguing from the fundamental citizens’ right to access public information, in particular to information related to mass human rights violations.⁴¹⁸ The Court has linked the duty to preserve records about past human rights violations with the victims’ rights “to justice, reparation and, in particular, to

⁴¹⁴ For a comparative analysis of the regime of archives on the periods of totalitarian regimes in Europe see Closa, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States*, Ch. 7, Table 7, 282.

⁴¹⁵ Naqvi, “The right to Truth”, 261.

⁴¹⁶ Ley de Justicia y Paz [Justice and Peace Law] n° 975/2005. Official Journal No. 45.980, 25 July 2005, available at <http://www.fiscalia.gov.co/>, Art. 57 (unofficial translation).

⁴¹⁷ Ibid., Artt. 57 and 58.

⁴¹⁸ Colombian Const. Court, Judgment No. C-872/03 (2003).

know the truth”,⁴¹⁹ and has stressed the instrumental role of the duty to preserve in enhancing the “fundamental right to the truth for victims of human rights violations and the right to memory for the Colombian society”.⁴²⁰ Consequently, the Court has urged the government to undertake actions to ensure the protection of classified documents, in order to allow their publication in the future. To that aim, the Court required the state to establish criminal and administrative sanctions for acts that may threaten the security of that information during the period they were covered by the secrecy clause, as well as to adopt administrative procedures to preserve the integrity of records.⁴²¹ National courts of other countries, albeit in less explicit terms, have ruled along similar lines.⁴²²

The combined reading of this national practice and the repeated statements of international bodies on this matter, ultimately encourages the attachment of legal value to the ‘duty to preserve memory’ to be recognized as a logical precondition for the effective implementation of the right to access to information.

3. Standards of the Duty to Preserve

Besides its recognition in practice and its theoretical conceptualizations, what is the actual content of the duty to preserve memory in the context of gross human rights abuses? In other words, in what ways do international principles influence states’ conduct in the regulation of the duty to preserve documents and materials related to human rights violations? As demonstrated in the foregoing discussion, it is clear that archives and collections are the most immediate expression of the duty to preserve memory. Above, I have already discussed the intrinsic relation between human rights archives and the memories of the abuses they document.⁴²³ I also showed that the importance of this kind of archives is generally recognized and acknowledged by most of the instruments related to the victims’ right to access to information in cases of gross human rights violations.⁴²⁴ On the basis of the practice of

⁴¹⁹ Ibid. The same reasoning was included also in Judgment No. C-370/06 (2006), concerning the access to public information in the framework of the Law on Justice and Peace.

⁴²⁰ Colombian Const. Court, Judgment No. C-491/07 (2007), para. 9 (unofficial translation).

⁴²¹ Ibid., para. 11(8).

⁴²² In relation to the obligation to safeguard public information records in order to preserve the right of access to public information (although not specifically with regard to gross human rights breaches), see the Hungarian Constitutional Court decision No. 32/2006.

⁴²³ *Supra*, para 1.1.

⁴²⁴ *Supra*, para 2.1.

international human rights bodies and state practice, I therefore argued the progressive emergence of a state duty to create and preserve human rights archives.

Many of the revised international instruments also offer states further guidelines on how to regulate and manage such records.⁴²⁵ The UN Special Rapporteur Mr. Joinet's final report on the question of impunity, for instance, suggests a set of technical measures designed to ensure preservation of, and access to archives containing information on human rights abuses.⁴²⁶ The 2009 OHCHR Report on the right to truth - which recommends best practices for the effective implementation of the right to the truth -, as well as the report on experiences of archives as a means of guaranteeing the right to the truth provide specific guidance on how to use records in transitional justice processes and how to manage records collected by transitional justice institutions.⁴²⁷ Furthermore, especially since 2009, UN bodies have promoted a work of supervision, recollection, and harmonization of best practice in the management of, and access to archives on human rights abuses. Within this trend, in 2012, the Human Right Council requested that states report on good practice,⁴²⁸ and in 2013, the OHCHR sent follow up questionnaires to states. An official document that collects and promotes good practices and guidelines is expected in the near future.⁴²⁹ In addition to these official international documents, the International Council on Archives (ICA), together with UNESCO, has played a key role in developing best practices on managing human rights archives, which subsequently have been endorsed by states and international bodies. In particular the ICA-UNESCO report on the management of archives of security services of

⁴²⁵ In 2004, the joint declaration by the Rapporteurs on Freedom of Expression from the UN, the OAS, and the OSCE affirmed that "[p]ublic authorities should be required to meet minimum record management standards" and "[s]ystems should be put in place to promote higher standards over time." UN, OSCE, OAS Special Rapporteurs on freedom of expression, *Joint declaration on freedom of expression* (2004).

⁴²⁶ CHR, Sub-Commission on the Promotion and Protection of Human Rights, *Revised Final report prepared by Mr. Joinet on the question of the impunity of perpetrators of human rights violations*, para. 25.

⁴²⁷ HRCouncil, *Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, 21 August 2009. UN. Doc. A/HRC/12/19. See also the OHCHR *Report on the seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21.

⁴²⁸ HRCouncil, *Resolution 21/7: Right to the truth*, para. 21.

⁴²⁹ Personal interview with an OHCHR officer.

former repressive regimes has to be mentioned, which has become a point of reference for governments and institutions dealing with the records of former totalitarian regimes.⁴³⁰

All these guidelines and principles offer indications about the way states should behave when dealing with records related to past periods of mass violence. While they cannot be considered evidence of an existing legal obligation to create and maintain archives,⁴³¹ they inform state conduct, and thereby contribute to refining the content of such an emerging duty. Hence, even though they are not binding, from a glance at these instruments one can extrapolate international standards that states are encouraged to embody in their legislative and administrative policies on documents management. In general, these instruments place the responsibility of providing an adequate legislative framework and sufficient financial support to ensure the creation and maintenance of human rights archives on states, whilst preserving the intellectual freedom of archivists regarding the selection and administration of documents. The duty to preserve, in this sense, mainly looks like a duty to enable, ensure and monitor the adequate preservation and management of records, by means of, *inter alia*, providing appropriate education programs for training professional archivists on the specificities of records related to human rights abuses. Eventually, the ultimate responsibility for the appropriate management of resources rests with archival institutions and professionals.

In particular, international guidelines encourage states to do the following:

- i. To gather and collect documentation related to periods of human rights crises, and repression from national and local governmental departments and public administrations which were involved in the violations.⁴³²
- ii. To create a legal and administrative framework to systematize information by “archiving systems and registries that allow the past to be known”;⁴³³

⁴³⁰ González Quintana, A., *An updated and fuller version of the report prepared by UNESCO and the International Council on Archives (1995), concerning the management of the archives of the state security services of former repressive regimes* (Paris: International Council on Archives: 2009). Moreover, the ICA Human Rights Working Group has recently drafted the *Basic Principles of the Role of Archivists in Support of Human Rights*, which are awaiting formal sanction from UNESCO. ICA – Human Rights Working Group, *Basic Principles of the Role of Archivists in Support of Human Rights*. June 2014, available at: <http://www.ica.org/>.

⁴³¹ Of course with the exception of the provisions enshrined in the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, examined above in this chapter (*supra*, para. 2.1). Those provisions, however, do not offer indications on the modalities of implementation of the state obligation to preserve archives.

⁴³² E.g., IACommHR, *The Inter-American Legal Framework regarding the right to access to Information*, para. D.4(b)(c).

- iii. To ensure that records of human rights violations are efficiently managed by impartial, professional institutions. To that aim, in situations in which national institutions are weak or the public does not have confidence in them, transitional records centres should be established, to ensure that human rights archives are preserved, and there is accountability for their chain of custody;⁴³⁴
- iv. To establish an inventory of national archives and ensure coordination among them;⁴³⁵
- v. To establish dedicated oversight bodies or agencies in charge of supervising the compliance with best practice in data-collection and archive management;⁴³⁶
- vi. To allocate funds for adequate facilities, equipment, and tools to ensure access to, and consultation of stored data;
- vii. To implement and fund professional training courses and *ad hoc* education programs for archive staff;
- viii. To adopt protective and punitive measures against the removal, destruction, or misuse of records stored in archives.⁴³⁷

Finally, regarding the scope of the application of these duties, the definition of archives and the consequent duty to preserve them should be understood broadly, as suggested by Orentlicher's report. Since the rationale behind the duty to preserve historical documents relies on the collective interest in reading about the past, besides public archives managed by state bodies, governments should also be considered responsible for the protection of human rights records collected through the work of transitional institutions, as well as for private and non-governmental collections. When adopting this view, the duty to preserve memory expands to requiring that states preserve and maintain archives and databases of truth commissions and special tribunals, as well as "respect and protect the right of non-State organizations and individuals to collect, preserve and make available relevant documents concerning such

⁴³³ Ibid., para. 87; see also the UN, OSCE, OAS Special Rapporteurs on freedom of expression, *Joint declaration on freedom of expression* (2004), paras. 1 and 5.

⁴³⁴ OHCHR, *Report on the seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21, paras. 8-9; 50.

⁴³⁵ CHR, *Updated Set of Principles to Combat Impunity*, Principle 18.

⁴³⁶ E.g. OAS, *Recommendations on Access to Information*, IV.

⁴³⁷ CHR, *Updated Set of Principles to Combat Impunity*, Principle 14.

violations”.⁴³⁸ In these cases, however, the public role is limited to ensuring the protection and physical preservation of the records that private collections hold, and the premisis on which they are found.⁴³⁹

Concluding Remarks

This chapter has explored an additional burden that international human rights bodies place on states concerning the way they interpret and represent knowledge about the past. The chapter has uncovered principles and provisions related to the preservation and management of documents referring to periods of mass violence and human rights abuses. I argued that these provisions and guidelines, when considered all together, hold states responsible for collecting and preserving documentary sources that allow individuals and society to consider the past. In the aftermath of mass violence, such a duty mainly expresses itself in the duty to create and preserve human rights archives documenting the periods of violence. This duty has been also meaningfully named “the duty to preserve memory”,⁴⁴⁰ to indicate the way archives closely relate with the creation and circulation of memories and the interpretation of history. International provisions regulating how human rights archives should be managed therefore necessarily influence the official and collective representations of the events they embody. In this sense, the duty to preserve adds a third piece to the puzzle that composes the duty of memory under international law: the duty to preserve.

The legal foundation of such a duty has been rooted mainly in the right to access information, in both its individual and collective dimensions. This dual dimension of the legal basis is also reflected in the duty to preserve and its conceptualizations. On the one hand, the individual dimension relates such a duty to the individual right to know. From this perspective, the duty to preserve documents is an instrument to enable victims to exercise their individual rights. On the other hand, the collective dimension of the duty to preserve underpins the interest of the society in knowing information about historical events which are milestones in

⁴³⁸ Ibid., para. 15. See also: OHCHR, *Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice* (HR/PUB/09/2), p. 32, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>. On this aspect, see also Petersen, T. *Final acts: a guide to preserving the records of Truth Commissions* (Washington D.C.: Woodrow Wilson Center Press:2005). González Quintana, *Archival policies in the protection of human rights*, 99 and ff.

⁴³⁹ OHCHR, *Report on the seminar on experiences of archives as a means to guarantee the right to the truth* A/HRC/17/21, paras. 15 and 52.

⁴⁴⁰ CHR, *Updated Set of Principles to Combat Impunity*, Principle 3.

the history of a community, underlying its identity. In this sense, the duty to preserve proves an extremely powerful tool in influencing the historical representation of the past within a society.

Even if it is admittedly still too early to speak of a binding character of the duty to preserve in the current state of the art, the practice of international and regional bodies has widely supported the argument in favour of its progressive emergence in human rights law. States have been encouraged to implement adequate archival policies and effective management systems in a number of declarations and resolutions of international organs. Different conceptualizations have been used, although most of these instances refer to the twofold dimension of the right to access information. Part of this practice, moreover, has stressed the identity profile of such a duty, opening the way for exploring the duty to preserve also from the field of preservation of cultural identity and heritage.

The practice of states dealing with the legacy of mass violations or authoritarian regimes is also a point in case of attaching legal value to behaviours that relate to whether – and how – governments should preserve materials on human rights abuses. In these contexts, in fact, states not only have frequently implemented pieces of legislation and administrative systems for retrieval of human rights records, but they have done so with a sense of legal obligation to comply with their international commitments. In order for the duty to preserve to evolve from soft law declaration to effectively recognized human rights law, however, a more explicit coordination between international and national practice is required, especially with regard to the enforcement of such a duty. Hence, at this stage, it seems that while a state obligation to protect human rights archives has been progressively embedded in the human rights practice and discourse, the implementation of such an obligation has yet to evolve.

From the point of view of memory, finally, the emergence of a duty to preserve would have considerable implications. In fact, the affirmation of its emergence would entail the acknowledgement of the progressive restriction of state power in determining the fate of historical records, and thereby the management of the knowledge about the past. If archives are sacred spaces of memory, the duty to preserve entails that states are expected to preserve that memory from the passage of time, preventing the destruction of, or damage to the documents in their custody. However, although the intervention of international law in regulating the relation between a state and the records of its past may prevent governments

from using archives as tools for historical revision and political manipulation of the past, the overregulation of such a duty in accordance to international principles may unduly deprive the professional category of archivists of their ethical task of interpreting, selecting, and managing resources. Again, such an intervention may eventually result in the paralysis of the local, social processes of interpreting and negotiating the past. However, so far it seems that, in its approach to the state duty to preserve, international law is only emphasizing a general duty to set up appropriate legal and administrative frameworks and to provide for adequate resources to guarantee the preservation of records. In fact, the minimum standards developed by international bodies leave a significant margin of discretion as to the concrete implementation of such a duty. At this stage, however, the recognition of the duty to preserve under international law arguably takes a step further in affirming the state duty to allow and preserve the remembrance of past atrocities.

Chapter V

The Duty to Commemorate

Introduction⁴⁴¹

This chapter conceptualizes an additional component of the duty of memory from the perspective of International and human rights law: the duty to commemorate as a form of reparation. It analyses and systematizes, through a critical approach, the use of commemoration and memorialisation initiatives as reparatory practices in contexts of transition from internal conflicts and authoritarian regimes. After drawing the contours of the duty to commemorate and its relation with memory processes, it explores the legal foundation of this duty, presenting the legal regime of the state's obligation to provide victims with reparations under international law and international human rights law. From this perspective, the chapter shows the need to adjust the classical framework of reparations to situations of massive and systematic violations of human rights, and introduce the role of memory-related initiatives in such a renovated system. Second, it critically analyses how memory-related initiatives have been concretely framed and implemented as remedial measures in the Latin American region. To this end, state practice and the case law of the Inter-American Court of Human Rights, the only judicial body that has ordered binding memory-related decisions as a form of reparation, are assessed. Lastly, in the final part, the chapter problematizes the use of commemorations as reparation tools. To do so, it presents the Peruvian case study of the memorial "*El Ojo que Lloró*", in Lima, in order to reflect on possible implications and problems of including memory-related initiatives in reparation orders issued by supranational bodies.

1. Memory and the Duty to Commemorate

In the theoretical framework of this thesis,⁴⁴² I argued that the law, in general, and international law, in particular, impacts on memory-making processes in two ways: directly

⁴⁴¹ A preliminary version part of this Chapter appeared in the International Journal of Conflict and Violence, Focus Section: Violence, Justice, and the Work of Memory. Campisi, M.C., "From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights", *IJCV* 8, no. 1 (2014): 61 – 74.

and indirectly.⁴⁴³ On the one hand, it can concretely introduce specific narratives into the social processes of memories-negotiation— often in the form of judicial decisions, but also through declarative laws that officialise a certain interpretation of history.⁴⁴⁴ On the other hand, it can influence the official mechanisms of production of knowledge about the past, therefore indirectly altering the processes of production, circulation, and preservation of narratives. While the components of the duty of memory examined in the previous chapters belong to the latter category, the duty to commemorate that is defined in this chapter falls within the first one.

In fact, the duty to commemorate is perhaps the most straightforward duty connected to memory-practices that international law places on states in the aftermath of mass violence. It requires that governments, in compliance with their international obligations, realize public acts of commemoration and acknowledgment – either material or non-material – in order to keep alive the memory of past traumatic events, and ensure that the remembrance of those experiences is transmitted to future generations. As such, it is clearly the most intrusive one in the processes of memory-making, since it explicitly and directly interferes with the content of official memories by forcing states to inscribe certain narratives of the past in the official history of a country.

The duty is inferred from human rights instruments - judicial decisions of human rights bodies, declarations, recommendations, and other soft-law documents –, as well as from the observation of the state practice of governments that bear the burden of a past of systematic violence and serious human rights abuses. As I will demonstrate through the examination of the relevant law and practice, the rationale behind these measures is two-sided. On the one hand, commemorations have been considered symbolic measures to redress the non-material component of victims' harm in the case of the most serious abuses; on the other hand, these measures have been conceived as guarantees for preventing the repetition of atrocities of the past in the future. In both these conceptualizations, commemorations have been framed in legal terms within the framework of reparations for gross and systematic

⁴⁴² *Supra*, Ch. I – On Memory.

⁴⁴³ This refers to the distinction made by Savelsberg and King in “Law and Collective Memory”, 190.

⁴⁴⁴ This was the case, for instance, for the law passed by the French parliament in 2001, which officially recognized the Armenian genocide of 1915. Law 2001/70, 21 January 2001, JORF n°0025 p. 1590, available at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000403928>. I will discuss this kind of legislative measures within the discussion about the regime of historical debate. *Infra* Ch. VI.

human rights violations. It is from this viewpoint that this chapter analyzes and systematizes them.

2. The Legal Basis to the Duty to Commemorate: The Obligation to Provide Reparations

2.1 Legal Foundation

The practice of human rights bodies and states that support the emergence of a duty to commemorate past human rights abuses finds its legal basis mainly in the state obligation to provide reparations to victims. It is therefore this legal basis that has to be explored to establish a framework for clarifying scope, content, and standards that characterize the duty to commemorate.

2.1.1 The obligation to repair under the Law of State Responsibility

Already in 1646, Grotius affirmed that “every fault creates the obligation to make good the losses”. This fundamental tort law principle, embedded in most of the modern legal systems, entails that “every act by which a person causes damage to another makes the person whose fault the damage occurred liable to make reparation”.⁴⁴⁵ That is, when a wrong is committed and harm is caused, the wrongdoer is obliged to compensate for the damage, and, specularly, the injured part is entitled to receive redress.⁴⁴⁶

Under international law, reparations have been traditionally conceptualized from the classical perspective of inter-state relations. international law was traditionally understood as the body of laws which governs relations among states. It is based upon accepted rules, either voluntarily posited by states in their mutual agreements, or emerging from widespread customs regarded as binding. Setting these rules generates a complex normative framework that directs states’ behaviours in their mutual relations. The reciprocal obligations which originate from this system describe the content of the primary rules which bind states in the dense net of international relations. When a state fails to comply with a primary obligation it owes another state – whether customary or conventional –, a new, independent relation arises

⁴⁴⁵ Code Napoléon, 1804, Article 1382.

⁴⁴⁶ For a comparative analysis of Tort Law systems, see Limpens, J. et al., “Liability for One’s Own Act”, in *International Encyclopedia of Comparative Law*, ed. Tunc, A., (Tübingen: Mohr, 1979), Vol. XI, 5.

between the responsible state and the injured party.⁴⁴⁷ The content of this new relation is regulated by the branch of international law governing the legal consequences of international unlawful acts, that is, the Law of State Responsibility. Most of the principles governing this field are nowadays codified in the UN Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter Articles on State Responsibility), which provide the basis for the forthcoming analysis of the system of reparation under general international law.⁴⁴⁸

In such a system, the obligation of the responsible state to make reparations for the harm done to another state is a component of the set of legal consequences which arise from the commission of an international wrong.⁴⁴⁹ Principles and standards of reparations were therefore originally conceived to adapt to the specific dynamics of inter-state wrongs. In the regime of state responsibility, the content of the obligation to reparation is informed by the principle of full reparation. The PCIJ, back in 1928, defined this principle as the state obligation “to wipe out all the consequence of the illegal act”,⁴⁵⁰ either by restoring the pre-

⁴⁴⁷ The distinction between primary and secondary norms under International Law is first and foremost owed to Roberto Ago. “Second Report on State Responsibility.” *Yearbook of International Law Commission* 2 (1970): 177-197, at 169. See also Crawford, J., “The ILC’s Articles On Responsibility Of States For Internationally Wrongful Acts: A Retrospect.” *American Journal Of International Law* 96 (2002): 874-890; Combacau, J. and Alland, D., “‘Primary’ and ‘secondary’ rules in the law of State responsibility categorizing international obligations”, *Netherlands Yearbook of International Law* 16 (1985): 81-109; Boyle, A.E., “State Responsibility and International Liability for Injuries Consequences of Acts Not Prohibited by International Law. A Necessary Distinction.” *International & Comparative Law Quarterly* 39, no.1 (1990): 1-26; Dupuy, P.M., “A general Stocktaking of the Law of Responsibility”, *European Journal of International Law* 13, no.5 (2002): 1053-1081, and “Reviewing the Difficulties of Codifications - On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility”, *European Journal of International Law* 10, no.2 (1999): 371-385.

⁴⁴⁸ In the middle of the fifties, the International Law Commission (ILC) embarked on the challenging project to revise the international norms regulating the Law of States Responsibility, to consolidate them in a written document, while promoting their progressive development. This fifty-year-long work of codification eventually led to the adoption of the Articles on State Responsibility by the United Nations General Assembly in 2001. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), ch.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html>. The UN General Assembly took note of them in the resolution adopted on 12 December 2001 (UN GA, *Resolution on the Responsibility of States for Internationally Wrongful Acts*, 12 December 2001. UN. Doc. A/56/83). The current text is now generally regarded as the point of reference for defining the content of the obligation to repair in this branch of International Law. For a critical analysis of the document, see Shelton, D., “Righting Wrongs: Reparations in the Articles on State Responsibility”, *American Journal of International Law* 96 (2002): 833-856.

⁴⁴⁹ Indeed, in the traditional doctrine of state responsibility expressed, first and foremost by professor Anzilotti, the obligation to repair was considered the content of the secondary relation between the wrongdoer and the injured states as a result of the breach of primary obligations. Anzilotti, D., *Teoria generale della responsabilità dello Stato nel diritto internazionale*. (Firenze, Lumachi: 1902). The development of theories on the law of state responsibility from Anzilotti to Ago is told by Nolte, G. “From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations.” *European Journal of International Law* 13, no. 5 (2002): 1083-1098.

⁴⁵⁰ P.C.I.J., *Factory at Chorzów*. Merits. Judgment No. 13, 1928, Series A, n° 17, p. 47.

existing state of affairs before the violation was committed, or providing full redress of the harms through monetary compensation.

As emerges from the Commentaries to the Articles on State Responsibility and the international practice, restitution of the *status quo ante* and compensation are certainly the two preferred forms of reparations under classical international law.⁴⁵¹ Although satisfaction is also included in the overarching system as a remedial modality, this category plays only a subsidiary role.⁴⁵² In fact, satisfaction was primarily drafted to cover “not financially assessable” damages - mostly those of a symbolical nature. Considering the specific nature of inter-state wrongs, nonetheless, its relevance in the overall set of measures to redress damages appears rather marginal. Hence, states shall implement actions of satisfaction only when, and if the first two modalities cannot achieve full reparation.⁴⁵³ Guarantees of non-repetition, instead, are not considered a modality of redress. Since they do not directly aim at redressing injury, but rather at preventing the future recurrence of the violation, they are understood as an autonomous and separate consequence that flows from the wrongful act.⁴⁵⁴

⁴⁵¹ These principles were consolidated by the ILC *Draft Articles on State Responsibility*. Developing the principle of full reparation, the *Articles* indicate specific forms of redress that states are to adopt and combine to make the offended party whole. These forms are: restitution, compensation, and satisfaction (Art. 34). After the breach of an international obligation, the wrongdoer state shall firstly adopt measures to restore the situation which existed prior to the commission of the wrong. Crawford, J., *The International Law Commission's articles on state responsibility: introduction, text and commentaries*. (Cambridge, New York, Cambridge University Press: 2002), Art. 35. See also ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, paras. 149.150. When restitutive measures are unavailable, or if they are insufficient to redress the harm, the principle of full reparation requires that the wrongdoer integrates (or substitutes) them with monetary compensation. Compensation is therefore the complementary instrument which the *Articles* provide “to fill in any gaps so as to ensure full reparation”. Crawford, *The International Law Commission's articles on state responsibility*, Art. 36.

⁴⁵² *Articles on States Responsibility*, Art. 37.1. According to the accompanying commentary to the *Articles*, satisfaction “is not a standard form of reparation, in the sense that the injury to a state may be fully repaired by restitution and/or compensation”. Crawford, *The International Law Commission's articles on state responsibility*, Art. 37.1.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Articles on States Responsibility*, Art. 30, which reads:

The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

The longstanding doctrinal debate about the nature of assurances of non-repetition is well-known. On the one hand, it has been argued that this obligation is rooted in the level of secondary obligations emerging from the violation of primary norms. According to this interpretation, the obligation to provide guarantees of non-

2.1.2 The Human Rights Framework of Reparations

The distinguishing features of state-individual relations logically justify some deviations from the traditional rules of international law in the regulation of these dynamics.⁴⁵⁵ In this relation, states take a legal position of guarantee, which places specific obligations of protection on states. In order to understand the specificity of human rights obligations on states, it is important to keep in mind the structure of human rights law. Every human rights norm has two main components: a positive recognition of the right itself, which implies the negative obligation of states to refrain from undermining its enjoyment; and a positive obligation to protect it, and ensure its effective enjoyment for the right holders.⁴⁵⁶ In practice,

repetition is part of the obligation to repair, often conceived as a form of satisfaction. This is the approach adopted by the *UN Basic Principles on Reparations*, which include these measures as one of the reparation's components. On the other hand, some scholars frame cessation and guarantees of non-repetition as already encapsulated in the primary norm. The latter position is reflected in Art. 30 of the *Articles on State Responsibility*, which is the result of the theoretical impulse driven by Crawford. The Commentary to Art. 30 states: "Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice. However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach" (Crawford, *The International Law Commission's articles on state responsibility*, Art. 30(11)). On the same direction, see also, ILC, *Report of the International Law Commission on the work of its forty-fifth session* (3 May 23 July 1993). Official Records of the General Assembly, Forty-eighth session, Supplement n. 10, *Yearbook of the International Law Commission* II, no. 2 (1993), 81 – 82, para 1: "Yet assurances and guarantees of non repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to reestablish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function." *Contra*, among the scholars attached to the first theory, we can mentioned: Cassese A., *Diritto internazionale*, Gaeta, P. ed. (Bologna: Il Mulino 2005), 310; Dupuy, P.M. *Droit International Public*, 8th ed. (Paris: Dalloz, 2005).

⁴⁵⁵ This argument has been shared by several international law and human rights scholars which have analysed the issue of reparations. See, inter alia, Shelton, *Remedies*; Antkowiak, T., "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond." *Columbia Journal of Transnational Law* 46 (2008): 351-419; Bartolini, G., *Riparazione per violazione dei diritti umani e ordinamento internazionale* (Napoli, Jovene: 2009) and "Reparation For Violations Of Human Rights: Possible Co-Ordination In The Case-Law Of International Supervisory Bodies" *Federalismi.it* no. 15 (2009).

⁴⁵⁶ This argument has been the result of recent developments of academic debates around the rights-classification discourse. In particular, it has been argued that the structure of each human right norms – regardless of its classification into the traditional categories of economic, social and cultural rights or civil and political – implies a set of different obligations. See, in particular, Shue, H., *Basic rights: Subsistence, affluence, and U.S. foreign policy*. (New Jersey: Princeton University Press, 1980); Eide, A., "Universalization of Human Rights versus Globalization of Economic Power", in *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven*, ed. Coomans, F. et al. (The Hague ; Boston, MA : Kluwer Law International, 2000), 110-111; and, Eide, A. et al., eds., *Food as a human right*, (Tokyo: United Nations University, 1984). This approach has been adopted by the ACommHPR to interpret "what is generally expected of governments under the Charter". See, for instance, ACommHPR, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm.No. 155/96, 13-27 October 2001, paras. 44 and ff. For other theories to classify human rights obligations, see Pisillo Mazzeschi, R., "Sulla Natura degli Obblighi Internazionali di Tutela dei Diritti Economici, Sociali e Culturali, in Diritti Individuali e Giustizia Internazionale", in *Liber Fausto Pocar*, ed. Venturini, G., Baratti, S. (Milano: Giuffrè Editore, 2009), 717. Recently, the distinction was used also by the OHCHR, see ESC, *Report of the United Nations High Commissioner for Human Rights*, 25 June 2007. UN. Doc. E/2007/82, paras. 10 and ff.

the general obligation to protect and ensure requires the adoption of measures of safeguard, the duty to investigate the facts, and, ultimately, to make good the injury caused to victims.⁴⁵⁷ The obligation that states bear to provide reparation as a consequence of a human rights breach therefore finds its origins in this relation of protection.⁴⁵⁸

On these grounds, even at the inter-state level, there has been a progressive recognition of the victims' right to reparation.⁴⁵⁹ The increasing practice of creating *ad hoc* compensation commissions to redress victims of past injustices for the wrongs they – or their heirs – suffered, are a clear point in case. War reparations is a fruitful field in which this practice has been first developed. In this domain, we can recall, *inter alia*, the UN Compensation Commission, established by the Security Council in the aftermath of the nineties Gulf War to deal with the damage caused by the Iraqi invasion of Kuwait;⁴⁶⁰ as well as the Eritrea-Ethiopia

⁴⁵⁷ On the doctrine of positive obligations, see Xenos, D., *The positive obligations of the state under the European Convention of Human Rights* (London, Routledge: 2011); Mowbray, A. R., *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publisher: 2004); on a different domain, see Bakker, C., "Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State", in *War by contract: human rights, humanitarian law, and private contractors*, eds. Francioni, F. and Ronzitti, N. (Oxford, Oxford University Press: 2011), 130–149.

⁴⁵⁸ In the report on extrajudicial, summary or arbitrary executions submitted by the Special Rapporteur Mr. Bacre Waly Ndiaye, the former Human Rights Commission stated: "The recognition of the duty to compensate victims of human rights violations, and the actual granting of compensation to them, presupposes the recognition by the Government of its obligation to ensure effective protection against human rights abuses on the basis of the respect for the fundamental rights and freedoms of every person." CHR, *Report of the Special Rapporteur Mr. Bacre Waly Ndiaye on Extrajudicial, summary or arbitrary executions*, 7 December 1993, UN. Doc.E/CN.4/1994/7, para. 688. On the obligation to protect under international law, see Bellamy, A. J., Davies, S. E., Glanville, L. eds. *The responsibility to protect and international law*. (Leiden, Boston, Martinus Nijhoff Publishers: 2011). Similarly, in the *Laoyza Tomayo* case, the IACtHR highlights the devastating impact that a human rights breach has on the trust relationship which should connect citizens and their governments. IACtHR, *Laoyza Tomayo v. Peru*. Reparations and Costs. Judgment of 27 November 1998, Series C, n° 42.

⁴⁵⁹ For a critical analysis of the emergence of a victims' right to reparation under general International law see, Tomuschat, C., *Reparation for Victims of Grave Human Rights Violations*. Tulane Journal of International and Comparative Law 10 (2002): 157-184.

⁴⁶⁰ UN SC, *Resolution 687/1991*, 8 April 1991. UN. Doc. S/RES/687 (1991). For an analysis of the origins, structure, mandate, and functioning of the UNCC, see, *inter alia*, Van Houtte, H., Das, H., Delmartino, B., "The United Nations Compensation Commission", in *The Handbook of Reparations*, ed. De Greiff, 322-378. See also Gattini, A., "The UN Compensation Commission: Old Rules, New Procedures on War Reparations", *European Journal of International Law* 13, No. 1 (2002): 161-181; Crook, J.R., "The United Nations Compensation Commission. A new structure to enforce State responsibility", *American Journal of International Law* 87 (1993): 144-157. For a critical analysis of the work of *ad hoc* compensation commissions, however, see, Tomuschat, C., "Darfur—Compensation for the Victims", *Journal of International Criminal Justice* 3, no. 3 (2005): 579-589.

Claims Commission, established in 2000 to settle the relevant compensation claims.⁴⁶¹ Reparation claims from Holocaust victims have also given rise to a number of different reparatory mechanisms at the supranational level, which have taken different forms, to ensure that those claims did not go unheard.⁴⁶² Over the last years, the *ad hoc* Reparation for Victims of Armed Conflict Committee of the International Law Association (ILA) has conducted a thorough study on reparations for victims of war in which the main elements and principles of these different reparation mechanisms have been analysed and compared. As a result of this study, the ILA has eventually adopted the Declaration of International Law Principles for Victims of Armed Conflict, in which it explicitly recognizes the victims' right to reparation and delineates the substantive aspects of this entitlement.⁴⁶³

The different nature of human rights obligations and the specific relation of protection in which they are inscribed, however, make it difficult to apply traditional principles of inter-state responsibility to the special system of human rights protection, especially when grave violations are committed on a large scale. Dinah Shelton has discussed the limits of the Law of State Responsibility in confronting these kinds of violations (e.g. the magnitude of reparation claims; the precarious financial and political conditions of governments emerging from context of mass violence; the complexity of the harm to be redressed; etc.).⁴⁶⁴ The special nature of human rights breaches – and in particular of the most serious ones – raises the issue of whether the typical forms codified in the Articles on State Responsibility by the ILC suffice to determine the actual content of the state obligation to repair also in case of serious breaches of human rights obligations. Especially in these cases, beyond the need to redress the serious harm suffered by individuals, remedies have to serve other different political and social

⁴⁶¹ Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, available at <http://www.pca-cpa.org>. However, it has to be underscored that the Commission does not allow for direct access by individuals.

⁴⁶² See, *inter alia*, the International Commission on Holocaust Era Insurance Claims, which was created as a result of the agreement between 75 European insurance companies, U.S. insurance regulators, as well as representatives of international Jewish and survivor organizations and the State of Israel. Memorandum of Understanding, 25 August 1998, available at: <http://www.icheic.org/>. For other reparation mechanisms for Holocaust victims, see the analysis carried out by Professor Ronzitti in ILA, *Conference Report on Reparation for Victims of Armed Conflict*. Washington, 7-11 April 2014, available at: <http://www.ila-hq.org>.

⁴⁶³ ILA, *Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*. Hague Conference, Resolution No 2/2010, 20 August 2010. The procedural mechanisms of enforcement of the right to reparation for victims of armed conflict were tackled in 2014 Washington Conference. ILA, *Resolution of International Law Principles on Reparation for Victims of Armed Conflict (Procedural Issues)*. Washington Conference, Resolution 1/2014. 11 April 2014, available at: <http://www.ila-hq.org>.

⁴⁶⁴ Shelton, *Remedies*, 97-102; 389-391.

functions, e.g. to prevent the recurrence of similar violations, to reinforce and restore the institutional political system, to offer guarantees to the society and the international community, to balance the victims' demand of redress against essential interests of the state, etc.⁴⁶⁵

The obligation to provide victims with remedies is enshrined in most international human rights instruments, which require states to provide remedies for violations committed against individuals by their agents. Whilst these provisions rarely indicate specific modalities of redress, most of them require remedies to be effective, adequate, or appropriate.⁴⁶⁶ Because of the broad parameters they indicate, states enjoy a wide margin of discretion in drafting and implementing remedial measures. Yet, the question arises what can be considered an appropriate remedy, especially in contexts of systematic and unspeakably brutal abuses of human rights.

Scholars have attempted to define the concept of adequacy from different perspectives.⁴⁶⁷ Lenzerini, among others, suggests two useful elements to assess the degree of adequacy of reparation measures: an objective criterion and a subjective one.⁴⁶⁸ The first criterion relies upon the notion of proportionality, which relates reparations to the gravity of the harm in the specific case. For this condition, reparation measures are adequate when they

⁴⁶⁵ Ibid., 99.

⁴⁶⁶ The notion of effectiveness and adequacy of remedies – even if in different wording - is enshrined in all main human rights instruments. Among others, we can mention: UDHR, Art. 8; ICCPR, Art. 2(3); CAT, Art. 14(1); ICED, Art. 24(4); CERD, Art. 7; *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007. UN. Doc. A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>, Art. 40; ILO, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169, Arts. 15-16, available at: <http://www.refworld.org/docid/3ddb6d514.html>.

⁴⁶⁷ For a theoretical analysis of remedial theories, see, above all, Shelton, *Remedies*, Ch. I. For an overview of the practice of international bodies concerning the notion of 'effective remedy', see Van Boven, T., "Victims' Right to a Remedy and Reparation: the New United Nations Principles and Guidelines". In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, eds. Ferstman, C. Goetz and Stephens (Leiden, the Netherlands: Martinus Nijhoff: 2009), 19–40, at 22. De Greiff discusses how supervisory bodies of Human Rights instruments understand the idea of "fair", "just" and "adequate" satisfaction. De Greiff, P., "Justice and Reparation", in *The Handbook of Reparation*, 457. A different study on the concept of effective reparation from a psychological perspective is provided in Danieli, Y., "Massive Trauma and the Healing Role of Reparative Justice", in *Reparations for Victims of Genocide*, 41–77.

⁴⁶⁸ Lenzerini, *Reparations for Indigenous Peoples*, 15.

are proportionate to the seriousness of the harm.⁴⁶⁹ The second criterion calls for an internal evaluation of the reparation modalities that have been undertaken by states. This evaluation should be assessed by the injured individuals; accordingly, reparation measures are adequate when victims perceive them as being adequate. The combination of these two criteria ultimately allows it to adjust the concept of adequate reparation to specific situations and conditions, both objectively and subjectively.⁴⁷⁰ In other words, it essentially suggests a casuistic approach to define the content of the state obligation to provide adequate reparations.⁴⁷¹

With this perspective in mind when facing the inadequacy of the traditional reparation system, both human rights instruments and judicial and quasi-judicial institutions dealing with situations of grave and widespread violations have embraced a more generous and creative understanding of the obligation to provide reparations to victims.⁴⁷² Two trends in the practice of human rights bodies and transitional states have proven important in opening up the traditional remedial framework for adapting to gross and systematic abuses: the increasing

⁴⁶⁹ The principle of proportionality was already indicated as a criteria to determine the scope of due remedies in the traditional Law of State Responsibility. In the *Lusitania cases*, for instance, the Umpire upheld this view, stating that “remedy must be commensurate with the injury received”, and referred to the concepts of adequacy and balance to describe the measure of due compensation. Mixed Claim Commission, *Lusitania Cases (United States v. Germany)*, Opinion of 1 November 1923, 7 R.I.A.A. 32, at 35 – 36.

⁴⁷⁰ A similar analysis, although using different criteria (i.e. fairness and appropriateness), is put forth in Rombouts, H., Sardaro, P., and Vandeginste, S., “The Right to reparation for Victims of Gross and Systematic Violations of Human Rights”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human*, eds. De Feyter et al. (Antwerp: Intersentia, 2005), 459 – 460.

⁴⁷¹ This interpretation seems to mirror the current trend in international judicial practice. For instance the International Court of Justice, in the case of *Avena and other Mexican Nationals*, maintained:

[w]hat constitutes ‘reparation in an adequate form’ clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the ‘reparation in an adequate form’ that corresponds to the injury.

ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I.C.J. Reports 2004. Monitoring bodies have also confirmed the parallel between *adequacy* and *proportionality to the gravity*. See, for instance, the reports submitted by the UN Working Group on Enforced or Involuntary Disappearance (WG EID), since 1998. *Report of the Working Group on Enforced or Involuntary Disappearances*, 12 January 1998, UN Doc. E/CN.4/1998/43, para. 16.

⁴⁷² On the inadequacy of traditional forms of reparation to situations of mass and systematic violence, see, *inter alia*, Tomuschat, C. “Individual reparation claims in instances of gross violations of human rights”, in *State responsibility and the individual: reparation in instances of grave violations of human rights*, eds. Randelzhofer, A. and Tomuschat, C. (The Hague; Boston: M. Nijhoff; 1999) 19-20. According to De Greiff, “there is no transitional or post conflict reparations program that has managed to compensate victims in proportion to the harm they suffered”. De Greiff, “Justice and Reparation”, in *The Handbook of Reparation*, 457. In the same chapter, the Author illustrates how supervisory bodies of Human Rights instruments understand the idea of ‘fair’, ‘just’, and ‘adequate’ satisfaction. *Ibid*.

adoption of non-monetary forms of reparations and the creation of collective-based measures of redress. Straddling these two trends, commemorative measures take place in the emerging system of redress for victims of gross and systematic violations. Before looking at the practice of commemorations as a remedial tool, we should therefore consider this renovated remedial system.

2.1.2.1 Reparations for Victims of Gross and Systematic violations: The UN Principles on the Right to a Remedy and the inclusion of a duty to commemorate

The starting point to put forth and systematize a new approach to reparations in cases of mass violence are the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted by consensus in Resolution 60/147 of the UN General Assembly in December 2005, the Basic Principles result from a long process of collection, study, analysis, and revision of practices of, and provisions on the issue of reparations for victims of mass violence, which the UN Special Rapporteur van Boven and the independent expert Cherif Bassiouni undertook from 1989 to 2005.⁴⁷³ Today, they constitute the point of reference for both governments and human rights bodies that deal with the challenging task of establishing reparations in the aftermath of serious and systematic human rights abuses. Although as any General Assembly resolution, by their very nature they cannot impose legally binding obligations on states, they are relevant in that they “identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations”.⁴⁷⁴ And indeed, despite this non-binding status, the Basic Principles have already quite strongly influenced trends and behaviours of national and international bodies. While a detailed review of the Basic Principles is beyond the scope of this chapter, this section

⁴⁷³ The process was set out in 1989 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which entrusted Van Boven with undertaking “a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing basic principles and guidelines on the issue”. CHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Resolution: Compensation for Victims of Gross Violations of Human Rights 1989/13*, 31 August 1989. UN. Doc. E/CN.4/Sub.2/1989/58 E/CN.4/1990/2

⁴⁷⁴ UN *Basic Principles on Reparations*, Seventh preambular clause.

provides a brief overview of the aspects that are most relevant for our discussion. This will provide the background for discussing the role of memory-related measures as reparative means, and to understand the position that these measures can have within this system.

The Principles derive the state obligation to provide reparations from the broader state duty to provide victims with effective remedies, in itself a part of the general obligation to respect and protect human rights.⁴⁷⁵ Under the umbrella of the victims' right to remedies, the right to reparations is included in the set of victims' rights which arise as a consequence of gross and systematic violations, together with the rights to access to justice and information.⁴⁷⁶

The content of the victims' right to "adequate, effective and prompt reparation" is filled in with a rich set of measures that specify its different components. They are divided into five remedial categories: *restitutio in integrum* (restitution), compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁴⁷⁷ Thus, in comparison with the classical international law framework of reparations, the Basic Principles keep the traditional measures of *restitutio in integrum*, compensation and satisfaction, and enrich the content of the state obligation to repair with new forms of redress – rehabilitation and guarantees of non-repetition. Unlike the classical IL regime, moreover, the Principles bestow satisfaction with great relevance, which in turn plays a crucial role in the whole system of reparations. In fact, the category of satisfaction becomes a tool box containing a variety of reparative measures. According to principle 18, measures of satisfaction include: (a) actions aimed at putting an end to the violations; (b) the establishment of inquiries and truth seeking mechanisms; (c) the search and identification of the disappeared and reburial of bodies; (d) official recognition of, and (e) public apologies for the violations; (f) punishment of those responsible; (g) commemorations and tributes to the victims; and (h) publicity concerning the events constituting the violations in education training and programs. Memory-related initiatives, hence, have a role to play.

Overall, the Basic Principles support the idea that in cases of mass violence neither restitution nor monetary compensation are sufficient means for providing effective response to victims' suffering. The different forms of reparation embraced by the Basic Principles, taken

⁴⁷⁵ Ibid., Principle 3.

⁴⁷⁶ Ibid., Principle 11.

⁴⁷⁷ Ibid., Principle 18.

all together, aim to address the complexity of the harm in situations of widespread and gross human rights abuses better. As Dinah Shelton rightly notes, their combination, together with the criterion of proportionality suggested by the text, allows (quasi-)judicial bodies the necessary discretion to tailor appropriate forms of redress to specific cases.⁴⁷⁸ This multi-dimensional approach has offered a model for shaping national reparation programs, making them more effective and accurate in responding to victims' harms. The central role given to satisfaction, together with the inclusion of rehabilitation and guarantees of non-repetition in the list of victims' remedies, eventually seems to suggest new standards of adequacy, shifting the traditional understanding of reparation and embracing a more casuistic and victim-oriented approach.⁴⁷⁹ It is within this renovated redress framework that the duty to commemorate accrues as an instrument to provide healing for victims.

The UN Principles is not the only international human rights document that includes commemorations in the list of remedial tools for victims of serious abuses. Similar indications are also included in other soft law instruments – declarations, comments, resolutions, etc. – that, for addressing the victims' right to reparations, embrace the standards suggested by the Basic Principles. The HRC General Comment No. 31 on the nature of the general legal obligation imposed on state parties, for instance, after recalling that the obligation to provide victims with reparations is an essential modality for states to discharge their obligation to provide an effective remedy, indicates a list of measures that states should adopt “where appropriate” in compliance with their obligation to repair. Public commemorations – such as memorials and public apologies - are included in the list.⁴⁸⁰ Proactive measures to honour victims' memory and preserving the remembrance of past violations are also encouraged by the Durban Declaration and Programme of Action, which call for reparations for acts of racism and racial anti-discrimination.⁴⁸¹ Similarly, in the framework of the fight against enforced disappearance, a number of documents have frequently urged states to adopt

⁴⁷⁸ Shelton, *Remedies*, 149.

⁴⁷⁹ Ibid. In this sense, see also Bartolini, *Riparazione per Violazione dei Diritti Umani*, 468.

⁴⁸⁰ HRC, *General comment No. 31* [80], para. 16.

⁴⁸¹ *Durban Declaration and Plan of Action*, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001, available at: <http://www.refworld.org/docid/3db573314.html>, endorsed by the UN GA *Resolution 56/266* of 15 May 2002.

symbolic measures to publicly acknowledge victims' suffering, and restoring their good names.⁴⁸²

From the way these measures are phrased and on account of the non-binding nature of soft law instruments, it should remain clear that the inclusion of commemorations in the realm of remedies does not entail a formal obligation on responsible states to undertake commemorations for remedying *every* serious violation. The creation of memorials is *one* of the possible forms of satisfaction that should be given. The discretion in this system, by virtue of its multidimensionality, allows governments to decide if, and when commemorations are appropriate to offer consolation to victims. However, the inclusion of commemorations among the modalities for achieving an adequate system of reparations creates an incentive for states to promote and implement commemorative policies to comply with human rights standards.⁴⁸³ Moreover, on the other side, it grants supervisory and monitoring bodies the power to influence these policies, therefore interfering with the local processes of interpreting and remembering the past.

2.2 The Role of Commemorations in rethinking the legal regime of reparations

The formal inclusion of a duty to commemorate in the list of measures of reparations for gross and systematic human rights violations is meaningful. Frédéric Mégret, in an article on the possibility and feasibility of the International Criminal Court recommending the construction of “sites of conscience”, offers a meaningful analysis of the effects of commemorative measures as transitional justice tools, and it stresses the different functions that these initiatives can fulfil in the healing process of victims.⁴⁸⁴ Mégret highlights the many functions that monuments – broadly understood – can perform in reparation schemes aimed at addressing the aftermath of mass violence. Their functions include the restoration of the good

⁴⁸² See, *inter alia*, HRCouncil, *Resolution 21/4: Enforced or Involuntary Disappearances*, 27 September 2012. UN. Doc. A/HRC/RES/21/2, para. 17(h). The WG on Enforced or Involuntary Disappearance (WG EID) has constantly included memorials and commemorations in the recommendations for reparations issued during its monitoring task. E.g. *Report of the Working Group on Enforced or Involuntary Disappearances*, 28 January 2013, UN Doc. A/HRC/22/45, paras. 67-68.

⁴⁸³ For instance Uruguay, in its response to the list of issues presented by HRC in the reporting procedure, indicates the installation of a commemorative plaque of victim's name as evidence of its compliance with international human rights standards in discharging its obligations under the ICCPR. HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure: Uruguay*. 21 December 2012, UN. Doc. CCPR/C/URY/5 at 387 d.).

⁴⁸⁴ Mégret, F. “Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice.” *Buffalo Human Rights Law Review* 16, no. 1 (2010): 1-56.

name of the victims; providing a forum for mourning, discussion, and reflection about the past; paving the way for social reconciliation; and warning future generations against the repetition of similar atrocities.

Indeed, from a theoretical point of view, memory-related measures that have an impact on individual as well as collective processes of dealing with the past and which are closely linked to the very concepts of time and identity, appear uniquely suited to thoroughly rethink the concept of reparation. The inclusion of memory-related measures in the realm of remedies broadens the principle of full reparation so that it no longer coincides with the obligation “to wipe out all the consequences” of the violence. In the aftermath of mass atrocities, nothing can or has to be wiped out, but rather the harm must be acknowledged, brought to light, and commemorated, both to restore victims’ dignity in suffering and to convey a warning to future generations.⁴⁸⁵ Reparation, in this way, loses its meaning of closure, and opens up a new link between past, present, and future.⁴⁸⁶ The inclusion of memory, as the presence of the past, in the dynamics of reparation may allow the idea of reparation to move from meaning closure of the past toward the idea of reparation as a means of “transformative justice” - in the sense of development, progress, advancement.⁴⁸⁷ Although these theoretical developments have not been fully explored yet, as I will show in the next section, there is a trend clearly moving in that direction in the practice of reparations for victims of mass and systematic violence.

3. The Duty to Commemorate in the Practice

After considering the system of reparations for victims of grave violations, which offers the paradigm for framing the duty to commemorate in legal terms, and having observed

⁴⁸⁵ For a discussion of the role of recognition and acknowledgment in healing victims of gross human rights violations, see, *inter alia*, Schotsman, M. “Victim’s Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, 465–66. See also the empirical study carried out by Kiza, Rathgeber, and Rohne on the victims’ reactions to different forms of reparations, and – more in general – of officially addressing past violence. Kiza, E., Rathgeber, C., Rohne, H.-C., “Victims of War: An Empirical Study on War-Victimization and Victims’ Attitudes Towards Addressing Atrocities (Final Report),” (Hamburg: Hamburg Edition online, 2006).

⁴⁸⁶ For these thoughts, I have to thank the participants of the Emerging Scholars Workshop, held in the context of the Historical Justice and Memory Conference, hosted by the Swinburne Institute, Melbourne, 14 – 17 February 2012. I am particularly grateful to Louise Vella and Hermann Ruiz for their valuable contribution to developing these reflections.

⁴⁸⁷ The idea of ‘transformative reparations’ was developed by Mani in “The Aesthetics and Ethics of Repairing Historical Injustice”, keynote speech delivered during the Historical Justice and Memory Conference, Melbourne, 16 February 2012.

the progressive inclusion of commemorations as means of redress in legal instruments (although not binding), we should now consider how these commemorative initiatives have been implemented as forms of reparations in practice. The forthcoming analysis offers an empirical overview, and aims to achieve two main goals in particular:

- To offer a picture of the current practice regarding the use of commemorations in post-violence contexts;
- To clarify the systematization of this practice in the general framework of reparations.

This overview presents commemoration initiatives put forward by states and issued by judicial bodies as remedial tools in the aftermaths of mass human rights violations. It looks at the Latin-American experience in particular. Latin-America is, in fact, a fertile ground for this kind of research. The violence experienced in the past by most of the states there has compelled governments to face their past in order to activate transitional processes. Moreover, the active participation of the civil society in the process of reparations has significantly contributed to the discussion about the adequacy of remedial mechanisms in the region. This aspect, together with the inclusion of commemoration measures in reparatory schemes, has further contributed to the processes of negotiation that characterize the endeavour of working through the past. This makes this region an especially interesting field of research. Besides that, as we will discuss later in this chapter, the Inter-American Court of Human Rights that operates in the region has played, more than any other judicial body, a central role in framing commemorations as legal remedies. As a matter of fact, its case law provides a significant number of cases in which commemorations have been included in the reparation orders issued by the tribunal. In consideration of this, this geographic region seems the most fruitful for observing the phenomenon of shaping memories – through commemorations – in the form of secondary rights of victims.⁴⁸⁸ Since the calls for memory and reparations are loud and pressing in the region, commemoration initiatives by governments are increasingly numerous

⁴⁸⁸ In fact, it would not be the first time that Latin-American countries stand as an example of practice that goes on to be generally applied in International Law, contributing to the development and modernization of the international legal framework. This was the case, for instance, with the '*uti possidetis juris*' principle, first elaborated by Latin-American states for giving legitimacy to their borders after the decolonization process, and afterwards recognized by the ICJ as 'a general principle, which is logically connected with the phenomenon of the obtaining of independence' *Frontier Dispute* (Burkina Faso v. Republic of Mali), Judgment of 22 December 1986, I.C.J. Reports 1986, para. 20. See also, *Frontier Dispute*, (Benin v. Niger), Judgment of 12 July 2005, I.C.J. Reports 2005, para. 23 and ff.

and varied. Consequently - and obviously -, this overview will provide only a sketch of the most relevant examples. Nonetheless, by studying the most relevant cases, it will be possible to gain some insight into this process and assess the general trend.

3.1 The Duty to Commemorate in state practice

In the aftermath of mass violence, most of the states in the region have undertaken a number of initiatives for the public commemoration of past atrocities. A significant part of these measures consists in what have been called “sites of memory”, that is, symbolic spaces devoted to bereavement and mourning to keep alive the remembrance of grievous events.⁴⁸⁹ Pierre Nora introduced the concept of *lieux de memoire*, which he defines as “any significant entity, whether material or non-material in nature, which by dint of human will or the work of time has become a symbolic element of the memorial heritage of any community”.⁴⁹⁰ They can take different forms, such as commemorative plaques, monuments, museums, artworks, public ceremonies, and rites. They may also include sites and dates that bore a negative symbolic meaning for victims – such as former centres of torture or public places where abuses were committed –, which are subsequently transformed in structures, spaces, or symbols filled with a positive meaning – human rights centres, education institutes, spaces of commemoration, memorial days, and so on.

The analysis of the memory-related initiatives put in place by Latin-American governments revealed a great variety of actions, undertaken at different stages of the transitional processes and with different rationales. For the purpose of our investigation, we consider only official initiatives of commemorations, which have been organized by the state organs through legal decisions. These initiatives can be classified by different criteria. Considered from the point of view of the authority which set them up – the source -, these measures can be classified either as local initiatives (that is, put in place by local authorities, such as municipalities, cities, local administrations, etc.) or as national initiatives (carried out

⁴⁸⁹ Winter, *Sites of Memory, sites of mourning*.

⁴⁹⁰ Nora, P., “From lieux de mémoire to realms of memory.” In *Realms of Memory: Rethinking the French Past*, eds. Nora, P., and Lawrence D. Kritzman, Vol. 1, trans. Arthur Goldhammer (New York: Columbia University Press, 1998). Nora included many different forms of memory in the broad category of *lieux de memoire*: ceremonies, symbols, monuments, archives, commemorations, praises, dictionaries, and museums. However, in this study, I will use the concept of ‘site of memory’ as to indicate only physical spaces, such as memorials, museums, monuments, and places of commemoration.

by central institutions and defined by state laws). Considered from a different perspective, they can distinguish between autonomous initiatives and measures decided within the framework of more comprehensive programs. Finally, in spite of the heterogeneity of these actions, they can be grouped according to the rationale which underlies them, either remedial or preventative. The last criterion seems to suit the purpose of our investigation better, since it allows us to achieve two main results. First, from an empirical point of view, we will obtain a general overview of the different commemorations that have been used by states; second, from a legal perspective, we will be able to single out the different rationales behind these measures, and to arrange them within the framework of reparations.

3.1.1 Commemorations as symbolic reparations for victims

Commemorations provide public recognition to private suffering. Through these initiatives, victims find a space – either material or symbolic - in which to express their pain. The public condemnation of the violations they suffered redeems, through memorials, victims' violated dignity before the society.⁴⁹¹ In this sense, commemorations seem especially suited to providing some form of comfort to the profound suffering caused to victims by the most serious violence.⁴⁹² On this basis, most of the states in the region have included commemoration measures as means of satisfaction in national reparation programs that address victims of past violations.

Colombian national reparation schemes offer an emblematic case study. During the years of the struggle to overcome the civil conflict in the country from the middle of the last decade, the victims' demands for memory and reparations have entwined and developed along the same legal path. Hence, memory and reparations have been considered two faces of the same coin of transition, and as such have been included in the legal measures adopted by the government to facilitate the process toward peace. The Justice and Peace Law (*Ley de Justicia y Paz*) established the first comprehensive reparation program for victims of the internal conflict. It was adopted in 2005 by the Uribe government to facilitate the peace process

⁴⁹¹ According to the UN Special Rapporteur on Transitional Justice, Pablo De Grieff, public recognition may alleviate the victims' families' moral duty to remember the deaths, and in so doing allow them to move on. UN GA, *Note by the Secretary General: Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 8 October 2014. UN. Doc. A/69/518, para. 33.

⁴⁹² For an empirical assessment of reparation measures in addressing victims' needs, see Kiza, Rathgeber, Rohne, "Victims of War: An Empirical Study".

through the promotion of the victims' rights to truth, justice, and reparations.⁴⁹³ The Law takes a broad approach to reparations, which reflects the international standards envisioned by the UN Basic Principles, and includes the five categories envisioned therein:⁴⁹⁴ restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁴⁹⁵ Reparations are both material and symbolic measures, and encompass both individual and collective forms. Public policies of commemorations are explicitly included in the symbolic dimension of the remedial machine. Indeed, memory is presented as an overarching goal of symbolic redress. Symbolic reparations, in fact, are initiatives that intend "to ensure preservation of historical memory, non-repetition of the abuses, public acknowledgment of the facts, public forgiveness and restoration of the victims' dignity".⁴⁹⁶

The state duty to undertake commemorations in order to ensure the victims' right to reparations determined the creation of several bodies specifically working in the area of memory-preservation. The *Grupo de Memoria Historica* (GMH), for instance, was created within the National Commission for Reparation and Reconciliation (*Comisión Nacional de Reparación y Reconciliación*, CNRR), which was entrusted, among other functions, with following-up and assessing the reparation process, making recommendations for its adequate implementation, and indicating criteria for reparations.⁴⁹⁷ GMH was created to supervise the thematic working area meaningfully called "*Area de Memoria Historica*", and was mandated to implement, coordinate, and supervise memory-related initiatives.⁴⁹⁸

Even after the abolishment of the CNRR mandate, the centrality of memory-related measures in this remedial framework was maintained and advanced thanks to the adoption of the Victims' Law, *Ley de Víctimas*, in 2011.⁴⁹⁹ The Law sets the criteria and parameters for the government to implement – *inter alia* – the victims' right to reparation. The general

⁴⁹³ Ley de Justicia y Paz [Justice and Peace Law] n° 975/2005.

⁴⁹⁴ *Supra*, para. 2.1.

⁴⁹⁵ Ley de Justicia y Paz [Justice and Peace Law] n° 975/2005. Art. 8.

⁴⁹⁶ *Ibid.*, Art. 8 (unofficial translation).

⁴⁹⁷ *Ibid.*, Art. 51.4 and 51.5.

⁴⁹⁸ After the CNRR' abolishment, GMH was transformed into the *Centro Nacional de Memoria Histórica* by law. Art. 144, Ley 1448/2011, 10 June 2011, Official Journal 48096, 10 June 2011. The Centre's functioning is further regulated by governmental decree 4803/ 2011, 20 December 2011.

⁴⁹⁹ Ley 1448/2011.

provisions that regulate the remedial framework share the same holistic, integrated approach that was adopted by the *Ley de Justicia y Paz*, in line with international standards, and calls for an “effective and transformative” system of reparation. Accordingly, a long section of the Law of Victims is devoted to symbolic measures of satisfaction, in which memorialization initiatives are included and promoted. Article 139 lists some examples of commemorative acts: public acts of acknowledgment; public homage to victims; and construction of “public monuments with the perspective of reparation and reconciliation”.⁵⁰⁰ Interestingly, the Law also lists among the satisfaction measures a commemorative day for victims, during which the state is called to realize commemorations to the victims of violence in the country.⁵⁰¹ The remedial system is further strengthened by the creation of the Historical Memory Centre (*Centro de Memoria Historica* – CMH) as part of the National System for Comprehensive Attention and Reparation of Victims; the Centre is entrusted with the task – *inter alia* - to coordinate and formulate symbolic reparations.⁵⁰² The CMH, in collaboration with other public bodies and ministries, has promoted and coordinated a great number of local initiatives toward the elaboration and preservation of historical memory.

Far from being merely political initiatives, all these initiatives were considered by the Law of Victims’ monitoring commission to assess the level of state compliance with the national program of individual and collective reparations. In this sense, they were considered compliant behaviours capable to discharge – together with other measures - the state’s obligation to provide comprehensive reparations to victims.⁵⁰³ From the observation of such a remedial system, ultimately, it can be argued that public policies of commemorations are therefore officially undertaken by Colombia as remedial modalities of satisfaction, in compliance with the obligation to reparations.⁵⁰⁴

⁵⁰⁰ Ibid., Art. 139, c); d); e); f).

⁵⁰¹ Ibid., Art. 142.

⁵⁰² Ibid., Artt. 146-148 and <http://www.centrodememoriahistorica.gov.co/>.

⁵⁰³ Comisión De Seguimiento De Los Organismos De Control. “Segundo Informe De Seguimiento y Monitoreo a La Implementación de la Ley de Víctimas y Restitución de Tierras 2012-2013”. (Bogotá: Colombia, August 2013).

⁵⁰⁴ Similar conclusions can be drawn from the observation of other national reparation programs in the region. For other examples of domestic practice, see Ferstman et al., *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, part IV; De Greiff, *The Handbook of Reparations*, part I.

3.1.2 Commemorations as guarantees of non-repetition

Public commemorations are also strong educational instruments. Visiting commemorative spaces or attending commemorative ceremonies imply the emotional participation of visitors in the historical events represented in that specific context. This allows the public to grasp and develop a deeper understanding of the history which is told. As noted in an accurate piece about the preventative role of memorials, well-thought out commemorations help those who did not experience the abuses to ‘feel’ victims’ suffering and to become compassionate - in the etymological meaning of the term, i.e. *com-pathos*: sharing emotions - with those who went through it.⁵⁰⁵ Compassion is crucial for enabling understanding, and understanding, in turn, is a first step toward non-repetition. According to that study, “if the victims of human rights abuse can be seen both as human beings and as citizens unlawfully deprived of their rights by state violence, then a potential next generation of bystanders may develop a firm sense of social responsibility with regard to mass atrocity”.⁵⁰⁶ Hence, monuments and memorials representing past atrocities are *mementa* to future generations to not repeat the same wrongs.

Furthermore, from a different perspective, the official nature of public commemorations represents a formal acknowledgment by the state of its accountability for past violations. Through public commemorations, governments declare to both their societies and the international community that they are undertaking internal measures to prevent the recurrence of those abuses. Beyond the purpose of providing redress to individual victims, commemorations have been also implemented by governments as to symbolize that they have embarked on a process for coming to terms with past violence.

This preventative rationale indeed underlies a great number of public decisions about memorials. The Argentine experience offers excellent examples. Since the end of the nineties, the government has adopted a series of memory-related measures to publicly mark the distance from its authoritarian past. This is the case, for instance, in the requalification project transforming the former *Escuela de Mecanica de la Armada* (ESMA) into an “*Espacio para la*

⁵⁰⁵ “Never Again: Memorials and Prevention” article posted on the ICTJ, Memory and Justice website - www.memoryandjustice.org - on 26 October 2009 and updated 31 October 2009. Available at: <http://memoryandjustice.org/article/never-again-memorials-and-prevention/>.

⁵⁰⁶ Ibid.

Memoria y para la Promoción y Defensa de los Derechos Humanos".⁵⁰⁷ ESMA had been a detention centre during the years of the so-called 'Dirty War', where Argentine Navy personnel held in captivity, tortured, and eventually killed thousands of prisoners. The act that established this transformation turned ESMA into a space of commemoration and remembrance, with the aim – expressed in the text of the agreement – to allow for the re-elaboration, investigation, and transmission of the history of violence to future generations.⁵⁰⁸ The statements made by the President during the official inaugural ceremony of ESMA concisely explained the strong moral obligation to remember which underlay these legal measures, and highlighted the preventative rationale which justified them. On that occasion, the President first made a public apology for the atrocities committed by state agents during the military dictatorship. Then, he affirmed that Argentina is "obliged" to remember that dark page of its history as a collective exercise of memory, in order to prevent "oblivi[on from creating] a fertile ground for any future repetition".⁵⁰⁹

Further measures in the same direction were subsequently taken by the government. In 2006, a resolution was adopted that changed the national cultural heritage policy with regard to sites of memory related to the period of dictatorship.⁵¹⁰ The resolution accorded special

⁵⁰⁷ The transformation was decided thanks to the Agreement between the National Government and Buenos Aires City. "Convenio de Creación del Ente Público Espacio para la Memoria, la Promoción y Defensa de los Derechos Humanos", n. 46/07, 20 November 2007, sanctioned by the municipal law n. 2.599, 6 December 2007, BOCBA N° 2858, 25 January 2008, available at <http://www.cedom.gov.ar/es/legislacion/normas/leyes/ley2599.html>.

⁵⁰⁸ Agreement 46/07(2007). Preamble, *Considerandum* n° 12. Another *Considerandum* of the agreement further declares: "the cited *Espacio* will function both as symbolic reparation for the 'detention-disappearance' [of victims] and as contribution to the guarantee of non-repetition of the heinous crimes and of the impunity." Convenio de creación, organización y funcionamiento del ente de derecho público interjurisdiccional, con autarquía administrativa y económico-financiera, denominado 'Ente Público Espacio para la Memoria y para la Promoción y Defensa de los Derechos Humanos, between the National Government and the city of Buenos Aires, 20 November 2007, ratified by. Ley n° 26415, 10 September 2008, *Considerandum* VII.

⁵⁰⁹ This concept, publicly expressed by Nestor Kirchner during the ceremony, is also contained in the preamble of the above cited ESMA Agreement 46/07 (2007) between the City and the State: "es responsabilidad de las instituciones constitucionales de la República el recuerdo permanente de esta cruel etapa de la historia argentina como ejercicio colectivo de la memoria con el fin de enseñar a las actuales y futuras generaciones las consecuencias irreparables que trae aparejada la sustitución del Estado de Derecho por la aplicación de la violencia ilegal por quienes ejercen el poder del Estado, para evitar que el olvido sea caldo de cultivo de su futura repetición."

⁵¹⁰ Ministry of the Defence, Resolution n° 172, 20 February 2006, available at http://www.derhuman.jus.gov.ar/anm/pdfs/Res_172.pdf. The act declares every place that hosted clandestine detention centres during the dictatorship as "intangible" (Art. 1). The rationale referred to in the preamble of the resolution to justify this measure is multi-faceted. The duty to commemorate, however, is understood as a state obligation that the government must fulfil, in order to comply with the obligation to prevent repetition of future violations. The resolution echoed President Kirchner formal apology, and repeated the *Consideranda* which introduced the

protection to every place that hosted clandestine detention centres during the dictatorship, declaring them “intangible”. In this way, these sites are protected from any destruction or modification.⁵¹¹ The rationale referred to in the preamble of the resolution for justifying this measure is multi-faceted, and includes the victims’ rights to justice, truth, and reparations, as well as the rule of law and good governance. The duty to commemorate, however, is framed in the text as part of the state responsibility to prevent repetition of future violations. Echoing President Kirchner’s formal apology, it states that:

It is the responsibility of constitutional organs (...) as an exercise of collective memory, to teach future generations [about the irremediable consequences of the violence], in order to avoid that oblivion be ground for future repetition.⁵¹²

As it was for Colombia, all such commemorative measures were then provided as evidence of compliance with the state obligation to protect human rights by the government.⁵¹³

3.1.3 The syncretic nature of commemorations

The previous overview has described examples of commemoration measures that have been implemented by governments in order to fulfil their obligation to provide reparations and guarantees of non-repetition. The remedial and preventative arguments have been indicated as alternative, underlying rationales to those measures. As emerged from the presentation of the practice, these rationales nonetheless often overlap in that the preventative and remedial functions frequently coincide and coexist in the same initiative.

Twofold, for instance, is the rationale behind the initiative “*Proyecto Memorial*”, realized by the Chilean Ministry of Internal Affairs within the framework of the Human Rights Program of the government.⁵¹⁴ The project involves an array of memorials, meaningfully named *Obras de Reparación Simbólica*, designed to rehabilitate the historical memory of people. The initiative fits within a larger human rights agenda, inaugurated by President Lagos

ESMA agreement (*supra*, fn. 507): “It is the responsibility of constitutional organs (...) as an exercise of collective memory, to teach future generations [about the irremediable consequences of the violence], in order to avoid that oblivion be ground for future repetition.” (Preamble, Consideranda V – VI).

⁵¹¹ Ibid., Art. 1.

⁵¹² Ibid., Preamble, *Considerandum* V. Unofficial translation.

⁵¹³ See, for instance, *Report of the Working Group on Enforced or Involuntary Disappearance. Mission to Argentina*. 5 January 2009. UN. Doc. A/HRC/10/9/Add.1, paras. 65-66.

⁵¹⁴ Ministry on Internal Affairs, *Programa de Derechos Humanos*, at <http://www.ddhh.gov.cl/memoriales.html>

in 2003, and significantly called *No hay mañana sin ayer*.⁵¹⁵ The whole program insists on the key role of memory as an instrument of reconciliation and renovation for the State. The Government designated a fund of 450 million pesos to reconstructing and protecting the historical memory.⁵¹⁶ From 2002 until now, the program has supported the construction of thirty-eight commemorative artworks, in addition to the support provided for renovating and maintaining some of the existing ones. Each project included several commemorative initiatives. To date, one hundred and seventy pieces have been erected in thirteen regions of Chile.⁵¹⁷

According to the Interior Ministry, which is responsible for the implementation and supervision of the program, building crosses, plaques, and monuments as sites of memory, beyond providing a response to the need for memory of the whole population, contributes to complying with the state obligation of truth and reparations.⁵¹⁸ Presenting the program, the government acknowledges the remedial nature of commemorations. “Historical memory was and is a relevant factor in the search for, and definition of forms of reparation, to provide victims of gross human rights violations and their families with some form of relief for their suffering.”⁵¹⁹ The official website of the project presents these initiatives as an “essential part of the reparation process” for victims of gross human rights, in that they aim not only to remember the horrible crimes that were committed in the past, but also to restore the memory of each of the individual victims who suffered from those crimes. At the same time, the program highlights the preventative purpose of these initiatives. The pedagogical character of these measures, in fact, allows them to contribute to shaping a social conscience that may prevent the repetition of the same atrocities in the country.⁵²⁰ In this sense, the program is presented by the government both for the purpose of individual reparation and under the general human rights prevention argument. It is important to note, in conclusion, that the government indicated these measures during the supervision phase of compliance with the

⁵¹⁵ President Lagos’ human rights proposal to the government “No hay Mañana sin Ayer”, Chilean Government, 12 August 2003 at http://www.ddhh.gov.cl/filesapp/propuesta_DDHH.pdf.

⁵¹⁶ Ibid., 28.

⁵¹⁷ Data verified until August 2014 by the project’s official webpage, <http://www.ddhh.gov.cl/memoriales.html>.

⁵¹⁸ <http://www.ddhh.gov.cl/memoriales.html>.

⁵¹⁹ Ibid. Unofficial translation.

⁵²⁰ Ibid.

truth and reconciliation commissions' recommendations as evidence of compliance with the state obligations to repair and prevent. This ultimately suggests some degree of *opinio juris* underlying the adoption of such activities.

3.1.4 Assessing state practice

From the analysis of the practice in the region, it can be observed that there is a clear trend among states to read commemorative initiatives as an indispensable part of the reparatory policies. The practice has shown that these measures are underpinned by two different rationales: remedial and preventative. In the light of this first *excursus* into state practice, however, it seems that commemorations are not only important parts of post-violence state policies. Indeed, as has emerged from the interpretation of the legal and official documents and official statements analysed above, governments undertake these measures as if they owe their implementation to both victims, as a form of redress, and the society, as a means of protection and safeguard. Hence, commemorations are perceived as mandatory initiatives that governments implement to comply with the secondary obligations arising in the aftermath of mass human rights abuses, in both the compensatory and preventative dimensions.⁵²¹ After looking at the implementation of the duty to commemorate in the practice of states in the Americas, I should now proceed with examining how the main judicial body in the region has dealt with these measures.

3.2 The Duty to Commemorate in the jurisprudence of the Inter-American Court of Human Rights

The jurisprudence of the Inter-American Court of Human Rights has had a major part in fostering the emergence of a duty to commemorate in the legal framework of reparations. Since it was established, the Court has played a pivotal role in enhancing the regional system of human rights protection in the Americas.⁵²² Beyond that region, the principles developed in its progressive case law moreover have come to influence both the jurisprudence of the other

⁵²¹ This is possible, of course, if these measures fit within the framework of broader reparation schemes, and interact with other forms of redress.

⁵²² For an analysis of the Inter-American system of reparations for human rights violations, see, among others, Beristain, C.M., *Diálogos sobre la reparación: Experiencias en el sistema interamericano de derechos humanos*. (San José, CR: Instituto Interamericano de Derechos Humanos, 2008); Pasqualucci, J. M., *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed. (New York: Cambridge University Press, 2013); and Shelton, *Remedies*.

main human rights monitoring bodies and the development of general standards at the international level.⁵²³ On the issue of reparations, the Court has progressively moved from applying the standards developed in the international law system of state responsibility to a more flexible approach. In line with the traditional system, the Court initially understood reparation mainly as a synonym of monetary compensation, aimed at redressing the individual harm.⁵²⁴ However, the compensatory model progressively revealed its limits, and the Court acknowledged the insufficiency of such a system to provide redress for the kind of violations that were brought to its jurisdiction.⁵²⁵ As a result, the Court therefore gradually broadened the content of the state obligation to provide reparations beyond compensation, and eventually embraced the reparative model set forth by the Basic Principles. In line with them, the Court today understands reparations to include the five components mentioned above: *restitutio in integrum*, compensation, rehabilitation, satisfaction, and preventive measures.⁵²⁶

With regard to commemorations, in keeping with this expansive trend, the Court has included memory-related initiatives in its reparation judgments since the end of the nineties. The cases in which these measures were issued are cases of particular serious nature, either because of the rights infringed (right to life, right to personal integrity; personal freedom; right to family life), or because of the magnitude of the violations (often involving massacres or mass killings). The remedial orders related to the remembrance of the past issued by the Court were initially rather sporadic and limited in the behaviour they prescribed (namely, they

⁵²³ On the fragmentation of International Law, see ILC, *Reports of the study group on the fragmentation of international law*: “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. UN Doc. A/59/10, Chap. X (2004); UN. Doc.A/60/10, Chap. XI (2005), A/61/10, Chap. XII (2006). On the ‘cross-fertilisation’ phenomenon in the jurisprudence of the different human rights bodies on the specific issue of reparations, see in particular Bartolini, *Riparazione per Violazione dei Diritti Umani*, and “Reparation For Violations Of Human Rights”.

⁵²⁴ IACtHR, *Case of Velásquez-Rodríguez v. Honduras*. Merits, operative para. 5; and *Case of Velásquez-Rodríguez v. Honduras*, Reparations and Costs, para. 33.

⁵²⁵ This happened for the first time in 1993, in the judgment on reparations for the case *Aloeboetoe v. Suriname*. The case concerned acts of violence perpetrated by soldiers against a group of young Maroons in Suriname in 1987. After the state’s recognition of its responsibility for those violations, including the extra-judicial execution of seven men of the group, the Court ordered Suriname to reopen the school in the village of origin of the victims, and to create the conditions to enable it to function, “as an act of reparation”. *Case of Aloeboetoe et al. v. Suriname*. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 96. In the subsequent case law, in addition to compensations, the Court has ordered non-pecuniary measures as part of the reparative scheme. On the inadequacy of monetary measures of reparation for gross violations of human rights, see the separate opinion of Judge Cançado Trinidad in *Loayza Tamayo v. Peru*. Reparations and Costs. Judgment of November 27, 1998, Series C No. 42, paras. 8 – 12.

⁵²⁶ The Court referred to the *UN Basic Principles on Reparations* on several occasions. See, for instance, the case of *Loayza Tamayo v. Peru*, para. 85.

mainly required that buildings or sites were named after the victims). In the latest developments, their application has however progressively become more frequent, and their content has taken more sophisticated forms.⁵²⁷ As modalities of reparations, the Court has ordered states to erect memorials;⁵²⁸ install commemorative plaques;⁵²⁹ name institutes, schools, streets, and squares after victims;⁵³⁰ realize public ceremonies to honour victims' memories;⁵³¹ and publish accounts of the violations in official gazettes or newspapers.⁵³²

These measures all promote the construction and protection of a certain consciousness of the past. Beyond that, however, from a legal point of view, different rationales have been used by the Court to justify their inclusion in the reparative decisions, admittedly not always in a consistent way. A close reading of the Court's case law suggests two patterns. Firstly, the Court generally distinguishes among these measures according to the beneficiaries they aim to redress. On the one hand, there are cases where memory related measures are directed at

⁵²⁷ In *Radilla Pacheco*, for instance, accepting the initiative of the State, the Court ordered the publication of "a bibliographical sketch of the life of [the victim], accompanied either by the reproduction of official documents regarding this case (admissibility reports, orders, expert reports) or with oral testimonies on his trajectory [sic], gathered *in situ*, for which the State would hire an investigator." *Case of Radilla-Pacheco v. Mexico*, para. 355. Similar measures were also ordered in other cases, such as in *Myrna Mack Chang v. Guatemala*, where the Court asked the State to publicly honour the memory of the police investigator who was killed while investigating the facts. *Case of Myrna Mack-Chang v. Guatemala*, para. 278.

⁵²⁸ *Myrna Mack-Chang v. Guatemala*; *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116; *Case of the Moiwana Community v. Suriname*; *Case of the Mapiripán Massacre v. Colombia*; *Case of the Pueblo Bello Massacre v. Colombia*.

⁵²⁹ *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148.

⁵³⁰ IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Reparations and Costs; *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92; *Case of Servellón-García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152; *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108; *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112; *Case of Vargas-Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155.

⁵³¹ *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213, paras. 223-224; *Case of Chitay Nech v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 May 2010. Series C No. 212, para. 248; *Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196 para. 202; *Case of Carpio-Nicolle et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of November 22, 2004. Series C No. 117, para. 136; *Case of La Cantuta v. Peru*, para. 23; *Case of Escué-Zapata v. Colombia*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 177.

⁵³² *Case of Miguel Castro-Castro Prison v. Peru*; *Case of La Rochela Massacre v. Colombia*; *Case of the Massacres of El Mozote and neighboring locations v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252, para. 365.

compensating a single individual; on the other hand, cases where commemorations are meant to provide redress for a whole community or group. Secondly, the memory-related measures decided by the Court differ from each other according to the category of reparation in which they are classified; that is, some of them are issued as instruments of satisfaction for victims, others as measures of prevention.

These two different criteria of distinction – beneficiaries and remedial categories – intertwine, and seem to suggest a line of reasoning in the Court’s judgments. First of all, when memory-related initiatives are ordered as a means to provide satisfaction to the specific victim, the Court mostly relies on the right of the family or the next of kin to preserve their beloved’s memory, the legal justification of which is primarily linked to the right to know the truth.⁵³³ Second, memory-related measures have also often been ordered with a preventive function, as instruments to prevent similar abuses from reoccurring in the future. When this happens, especially for violations involving entire communities or indigenous groups, memory-related initiatives aimed at perpetuating the remembrance of the horrific violations throughout time, are seen alongside – reparation to individuals – as instruments for conveying a lesson to future generations. As such, they become components of the state’s general obligation to protect human rights.

These two different perspectives seem to imply the adoption of different forms of memorialization. In fact, when the case related to one victim or a limited number of victims, the Court has ordered *ad hoc* prescriptions aimed at restoring the victim’s memory as due satisfaction. For instance, in *Radilla Pacheco v. Mexico*, concerning the forced disappearance of a Mexican citizen at the hands of Mexican Army agents in 1974, and the subsequent lack of investigation by the judiciary, the Court ordered the state to perform a public act of acknowledgment, and to place a commemorative plaque with the victim’s name in the city where the crime had occurred. The Court stated that those measures were due “in satisfaction

⁵³³ Some other interesting lines of reasoning have also been put forward to justify these measures. Judge Cançado Trindade, for instance, in a number of separate opinions to the Court’s judgments, developed the idea of a truly moral obligation to remember, arguing from the corresponding moral (but certainly non-legal) right of the dead victim to be remembered. In his separate opinion to the *Moiwana Community v. Suriname* judgment, he wrote: “It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times. The dead need our faithfulness; they are entirely dependent upon it. The duties of the living towards them (...) encompass perennial remembrance”, *Case of Moiwana Community v. Suriname*. Separate Opinion of Judge A. A. Cançado Trindade, para. 89. In spite of the strong moral force of this argument, however, the remedial function of commemorations is the prevailing rationale in the legal reasoning of the Court in individual cases.

of the memory of [the victim]” and “with the objective of preserving the memory of [the victim] within the community”. In addition, the Court ordered the publication of a bibliographical sketch of the life of the victim to honour his memory.⁵³⁴

On the other hand, however, when a large number of people or a whole community was affected by the violence, the memory-related orders issued by the Court have consisted of broader memory-related projects, such as building monuments and creating sites of memory, often in addition to other preventive tools for non-repetition. These measures have frequently been ordered in cases involving massacres and violations of the rights of indigenous communities.⁵³⁵ The *Plan de Sánchez Massacre* case offers a good example. It relates to a massacre of more than 250 persons perpetrated by a unit of the Guatemalan army in the village of Plan de Sanchez on 18 July 1982. Most of the victims, who suffered atrocious abuses before being killed, were indigenous Maya-Achì people. In the decision on reparations, the Court, after requiring the state to “honour publicly the memory of those executed” during a public act of recognition, ordered Guatemala to fund maintenance and improvements to the chapel where the Maya community commemorate the victims of the Plan de Sánchez massacre. According to the Court, “this would help raise public awareness to avoid repetition of events (...) and keep alive the memory of those who died”.⁵³⁶

The Court applied this reasoning again, when, in another case of forced disappearance – the *Anzualdo Castro* case –, it rejected Peru’s offer to comply with its duty to provide satisfaction to the victim by, *inter alia*, realizing the project of a “Museum of Memory”.⁵³⁷ Whilst the Court had limited itself to issuing memory-related orders without further elaborating on their foundation in the previous cases, *Anzualdo* seems to offer some insight

⁵³⁴ *Radilla-Pacheco v. Mexico*, paras. 353–56.

⁵³⁵ See *Moiwana Community v. Suriname*, para. 218: “For those very reasons – to memorialize the events of November 29, 1986, as well as to prevent the recurrence of such dreadful actions in the future – the State shall build a monument and place it in a suitable public location.” *Mapiripán Massacre v. Colombia*, para. 315: “The State must build an appropriate and dignified monument in remembrance of the facts in the Mapiripán Massacre, as a measure to prevent such grave events happening in the future.” The same wording appears in *Pueblo Bello Massacre v. Colombia*, para. 278. Likewise, in *Ituango Massacres v. Colombia*, para. 408: “In addition, the State must erect a plaque in an appropriate public place in La Granja and in El Aro, so that the new generations are aware of the events that took place in this case.”

⁵³⁶ *Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs, paras. 100 and 104.

⁵³⁷ *Case of Anzualdo Castro Prison v. Peru*, para. 200.

into the Court's reasoning. After affirming the importance of vindicating the name and dignity of the victim and his or her next-of-kin, the Court argued that the construction of a memorial museum could not constitute an "adequate individual measure of satisfaction", however important this would be to restore and rehabilitate the "historical memory of the society". Based on this consideration, both as a measure of individual satisfaction "in order to preserve the memory of [the victim] and as a guarantee of non-repetition", in accordance with the claims of the victims' representatives, the Court instead required the state to place a commemorative plaque with the name of the victim.

Hence, also in the practice of the Court, the two functions of commemorations that emerged from the analysis of the state practice above – satisfaction and prevention – overlap. And indeed, the Court orders most of these measures to accomplish both.⁵³⁸ Commemorations thereby become means to address both the individual and collective claim for redress within the society. As a result, in the remedial framework drafted by the Court, the double function of the duty to commemorate eventually reflects and adapts to the dual nature of memory, in its collective and individual dimensions.

4. Rethinking Commemorations through Reparations: Problematic Aspects.

The practice of states and the IACtHR case law support the conceptualization of a duty to commemorate under the legal category of reparations, both in the individual and collective dimensions. Constructing the duty to commemorate as part of the obligation to provide reparations, however, has some relevant consequences. In fact, the application of the principles and standards of reparations to commemorations necessarily adds additional layers to the commemorative performance. Saying that a duty to commemorate stems from the victim's right to reparation may lead to the conclusion that there exists a (secondary) 'right to memory' with regard to past events. Such a right, if interpreted in a narrow sense as an individual right, enforceable through internal and international remedial mechanisms, would seriously endanger the democratic elaboration of narratives on the past. For a commemorative work to be created for providing satisfaction to a specific victim – or group of victims –, it would have to represent and celebrate the individual - or group - narrative of the past events

⁵³⁸ In the *Radilla-Pacheco* case, for instance, it was ruled that the restoration of the victim's name was important in order to prevent future violations, and that memory-recuperation initiatives serve both "the preservation of the memory and satisfaction of the victims, and recovery and reestablishment of historical memory within a democratic society". *Radilla-Pacheco v. Mexico*, para. 356.

which resulted from the victim's – or group's – memories of those events. Criteria of adequacy, effectiveness, and proportionality should apply to assess such measures. As a result, if commemoration is to be intended as a remedial measure of satisfaction for the specific victim(s), in line with Lenzerini's criteria of adequacy suggested above, modalities and forms of the commemorative performance are to be negotiated and assessed by the beneficiaries whose harm is to be alleviated by that initiative.

Yet, this victim-centred approach to memory-related measures as satisfaction measures may create memory-conflicts within the society, fuelling tensions between the individual and collective memories and between the goal of reparations and other transitional justice aims, such as reconciliation. The recognition of the right of the victim to have his or her own individual narrative publicly commemorated as a form of redress for his or her own suffering can clash with the broader community's interest in overcoming social conflicts and tensions. Especially in cases involving civil wars, ethnic conflicts, or the abuse of minority groups, the direct victims are in general just one of the parties involved in the pattern of violence. Remedial judicial orders have a limited scope, as the effects they produce are generally legally binding only for the legal parties to the case. As a consequence, *ad hoc* forms of commemoration ordered by judicial decisions and directed to restore a single victim or a specific group can leave out a number of victims and create a ranking of legitimacy among victims' narratives and memories.

On the other hand, however, the construction of the duty to commemorate as corresponding to a collective-based right to reparation, may promote the crystallization of monolithic social narratives to the detriment of individual memories.⁵³⁹ The definition of the specific purpose and the specific beneficiaries of commemorative acts is therefore essential to tailor context-sensitive remedial schemes as well as to assess the effective capability of commemorative measures to act as a form of satisfaction; symmetrically, such an evaluation is

⁵³⁹ For an analysis on collective reparations and group claims, see, *inter alia*, Rosenfeld, F., "Collective Reparations for victims of armed conflicts", *International Review of the Red Cross* 92, No. 879 (2010): 731-746 2010; Rubio Marín, R., "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression", in *The Gender of Reparations*, ed. Rubio Marín, R. (New York: Cambridge University Press, 2009), 385 – 387; Bassiouni, M. C., "The Protection of Collective Victims in International Law." *New York Law School of Human Rights Annual* 2 (1984): 239; Roht-Arriaza, N., and Orlovsky, K. "A complementary relationship: Reparations and development", in *Transitional justice and development: making connections*, eds. De Greiff, P. and Duthie (New York: Social Science Research Council, 2009): 170-213.

also essential to prevent legal decisions from producing unwanted side-effects on the delicate work of making sense of, and recollecting past atrocities.

Other problematic aspects arise when considering the possibility of memory-related orders to be issued as remedial measures by judicial bodies, including supranational institutions like the IACtHR. As the example below will show, the decisions of the Inter-American Court may interfere with local memory dynamics, bestowing special judicial protection on certain memory practices. In fact, the Court's decisions impose practices designed to remember on states – and on societies. Even more significantly, the Court goes as far as to require states not only to undertake measures *to* remember, but also to prescribe *what* and *how* to remember. To what extent is it desirable that such institutions mediate the process of elaboration and reconstruction of the past? What effects do the “judicial truths” established in the decisions on reparations issued by these bodies produce in the complex process of negotiation of collective memory within a society? What is the impact of these judgments on the interaction between the individual (recognition) and social (reconstruction) demands placed on memory as an instrument of reparation? While these normative and sociological questions fall outside the scope and means of this research, it is still compelling to raise them. In the following section, a case study of manipulation of memories through judicial remedial orders is discussed to provide an example of such shortcomings.

4.1 The Case of the Penal Miguel Castro-Castro v. Peru

In November 2006, the Inter-American Court of Human Rights held Peru responsible for violent acts committed by its agents in May 1992 within the maximum security penitentiary Miguel Castro-Castro.⁵⁴⁰ The *Castro-Castro* case occurred against a background of violence and violations of human rights that had traumatised Peru for twenty years. During the internal conflict that paralysed the country between 1980 and 2000, about seventy thousand Peruvians were killed, and more were disappeared.⁵⁴¹ The Peruvian Truth and Reconciliation Commission was established in 2001 by the new democratic government to shed light on the violations that were committed during the years of the conflict. After two

⁵⁴⁰ IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*.

⁵⁴¹ Comisión de la Verdad y Reconciliación (Peru), *Informe Final*. (Lima:CVR, 2003). Available at www.cverdad.org.pe/ifinal/index.php. On the years of the internal conflict in the country and the role of the Peruvian Truth and Reconciliation Commission see Citroni, G., *L'orrore rivelato: l'esperienza della Commissione della verità e riconciliazione in Perù, 1980-2000*. Milano: Giuffrè, 2004.

years of work and investigation, the Commission presented its Final Report, which was made public in 2003. Members of terrorist group *Sendero Luminoso* and agents of the state were held responsible for most of the violations.⁵⁴² The Commission ascertained that 6,443 acts of torture and abuse had been perpetrated.

Regarding the case, the Truth and Reconciliation Commission reported that about 175 inmates of the Castro-Castro prison – mostly women – were severely abused, and about 42 eventually killed in the course of the military operation “*Operativo Mudanza I*” ordered by President Fujimori.⁵⁴³ Most of the victims were accused of, awaiting trial for, or convicted of terrorism or treason offences. They were considered linked to *Sendero Luminoso*.⁵⁴⁴ In the judgment, after ascertaining the facts of the case, the Court accepted the partial acknowledgment of international responsibility by Peru, and ordered the state to undertake both monetary and non-monetary reparation measures. Among the latter, it required that the state would carry out a public act of acknowledgment of responsibility for the violations, specified in the decision “as any [sic] apology to the victims and for the satisfaction of their next of kin”,⁵⁴⁵ and would commemorate all the victims of the case by inscribing their names on the memorial “*El Ojo que Llora*” (The Eye that Cries).⁵⁴⁶

While commemorative measures had been requested by both the Commission and the victims’ representative, their requests differed from what the Court eventually ordered. The victims’ representative requested the construction of a specific monument or the creation of a park where the victims’ next of kin could plant trees in memory of the deceased. The state opposed those requests, arguing that “a monument (called the Eye that Cries) [had] already been erected in a public place of the capital of the Republic in favour of *all* the victims of the

⁵⁴² Sendero Luminoso was deemed responsible for 46 percent of the acts of violence, while state agents were considered responsible for 30 percent. *Ibid.*, Annex II.

⁵⁴³ *Ibid.*, vol. 7, chap. 2, 67.

⁵⁴⁴ *Miguel Castro-Castro Prison v. Peru*, para. 197.

⁵⁴⁵ *Miguel Castro-Castro Prison v. Peru*, operative part of the judgment, point 12. In the light of the meaning of the paragraph, the “any” in the quote should be considered a typographical error for “an”. This is also confirmed by the official Spanish version of the judgment.

⁵⁴⁶ *Ibid.*, para. 463.

conflict, and that it [was] the subject of continuous memorial and commemoration acts.”⁵⁴⁷ The Court therefore decided on a compromise, demanding the inscription of the victims’ names on the existing memorial. In doing so, however, the Court misread the history and meaning of the monument and underestimated the potential for its memory-order to evoke stronger tensions.

El Ojo que Lloro is a particularly meaningful monument for Peruvians. It was built in Lima in 2005, thanks to the initiative of Peruvian civil society groups, with the aim of paying tribute to, and preserving the memory of all victims, as well as to educate about recent Peruvian history. A trickle of water continuously runs from a large, granite boulder at the centre of the memorial, which is surrounded by a labyrinth of concentric circles made of thirty-two thousand little stones, on which the names of some of the victims are engraved. The memorial represents Pachamama, the Andean Mother Earth, who cries for her children.⁵⁴⁸

The inscription of the names of the victims in the *Castro-Castro* case was potentially capable of conveying a strong symbolic message to Peruvian society, and offering public redress to the memory of the victims. Nevertheless, the political proximity of those individuals to terrorist groups and their potential involvement in the civil conflict put the Court’s decision in a different perspective, sparking violent reactions in the country. On the one hand, human rights activists and those who defended the ruling upheld the importance of condemning the acts of violence perpetrated by the Fujimori regime, regardless of the political past of the deceased. On the other hand, the majority of the population felt uneasy about the decision to conflate memorialisation of “innocent victims” of the conflict (that is, of those civilians whose names had been originally inscribed in the memorial) with commemoration of those who were victims according to the Court’s decision, yet perceived as “perpetrators” by the public.⁵⁴⁹ Protests, sit-ins, heated public debates, and political declarations were carried out in the

⁵⁴⁷ Ibid., para. 454 (italics added).

⁵⁴⁸ <http://www.elojoquellora.pe/>.

⁵⁴⁹ It is interesting to note, however, that the names of the victims had already been inscribed on the Memorial since the beginning. However, this fact had not been brought to public attention before the IACtHR’s *Castro Castro* judgment.

country against the Court's decision.⁵⁵⁰ The very authority of the Court was questioned,⁵⁵¹ and, eventually, the monument was vandalised.

These social and political tensions brought to light the reality that the Peruvian past has not yet been dealt with in society. The Court's judgment brought to light persistent memory conflicts.⁵⁵² In Ciurlizza's words, the decision "pours salt in the open wound". According to this author, the public opinion received the decision as a "revealed truth", as an "axiom that nullifies any discussion", an insult to the suffering of the society, and, paradoxically, a denial of social memory.⁵⁵³ In the attempt to address the dual reparatory functions of memory as satisfaction and prevention, the Court's ruling clashed with the reconciliatory function of another memory that had been negotiated within the Peruvian social fabric, and was still struggling to be accepted and accommodated in that social fabric. As a result of this clash, the intrinsic link between memory and identity, which makes memory-related measures crucial for the process of social reconstruction in the aftermath of traumatic events, was broken because of the interference of an external actor. This legal construction of memory, decided from above, was viewed as an external imposition, and an outside element that could play no role in the social dynamics of making sense of past atrocities. From a symbol of unity and solidarity for all victims, *El Ojo que Lloro* turned into a site of contestation and division.⁵⁵⁴

⁵⁵⁰ Vargas Llosa, M., "El Ojo que llora". *Diario El Pais*, 14 January 2007. http://www.elpais.com/articulo/opinion/ojo/llora/elpepuint/20070114elpepiopi_5/Tes. On the violent reactions to the decision and for further reference, see Drinot, P., "For Whom the Eye Cries: Memory, Monumentality, and the Ontologies of Violence in Peru". *Journal of Latin American Cultural Studies* 18, no.1 (2009): 15–32.

⁵⁵¹ President Alan García declared that the Courts' insulting conclusions were offensive for a country which had been torn by the violence of terrorism. "[S]i la Corte quiere sancionar a los responsables, que lo haga, pero el pueblo ha sido agraviado y no se le puede obligar a pagar, con sus impuestos, cientos de millones a personas que destruyeron el país". *Perú21*, 10 January 2007, quoted in Drinot, "For Whom the Eye Cries", 56.

⁵⁵² Hite, C. "The Eye that Cries": The Politics of Representing Victims in Contemporary Peru." *Contracorriente* 5, no. 1 (2007): 108–34.

⁵⁵³ Ciurlizza, J., "Sentencia de la Corte Interamericana de Derechos Humanos. Caso Penal Miguel Castro Castro versus Perú". *Memorial "El Ojo que Lloro"*, 5 January 2007. Available at: <http://memorialelojoquellora.blogspot.it>.

⁵⁵⁴ The fascinating and complex nature of the memorial – and the history it tells – led many scholars, mostly from the memory studies field, to engage with its meaning. Especially since 2007, after it was subjected to acts of vandalism, the monument has been at the centre of the memory debates in Peru. Scholars have used the recent history of "The Eye that Cries" as a starting point to investigate and analyse the deeper roots and dynamics of the conflicting interpretations of the Peruvian past and memory polemic. E.g. Milton, C. E. "Defacing Memory: (Un)tying Peru's Memory Knots." *Memory Studies* 4, No.2 (2011): 190–205.; Drinot, "For Whom the

Concluding remarks

International human rights law has seen recent advances in the legal regime for reparations in cases of grave abuses of human rights. In particular, traditional mechanisms of the reparation regime have been revised in the light of the specific features that characterize this kind of abuses. This has resulted in the elaboration of more complex and flexible reparation schemes by states and human rights bodies that better adapt to these situations.

Against this background, this chapter has drawn attention to the emerging practice of incorporating a duty to commemorate into the state obligation to provide reparations to victims. To that effect, the chapter has reviewed the practice of states and judicial bodies on reparations for mass violations in light of the legal regime of reparations under international and human rights law. The geographic focus of the investigation was the Latin America region. Practical and ethical hurdles of implementing this practice have been pointed out. Based on the investigation of this practice, some concluding observations can be made.

First, it can be said that national and international practice use commemorations as modalities of reparation for victims, implementing them both through their inclusion in integral reparative programs and as standalone elements of *ad hoc* actions of redress. Second, it seems that states adopt this kind of measures with a sense of legal obligation towards victims, as a form of satisfaction. The Inter-American Court, in particular, includes reparation orders related to the remembrance of the past under the category of satisfaction. Third, the practice shows that commemorations are also undertaken as guarantees of non-repetition for both the society and the international community. The coexistence of the satisfactory and preventive functions in memorialization initiatives ultimately makes them suitable to meet the complexity of the system of reparations for gross human rights violations.

However, drawing commemoration measures as remedial tools under human rights law, implies that each measure should be displayed and evaluated through the criteria for assessing reparations. In particular, it means that, in order to be considered a form of adequate reparation, through which responsible states can discharge their obligation to repair according to both international and human rights laws, each commemorative performance should meet

Eye Cries: Memory, Monumentality, and the Ontologies of Violence in Peru”; Hite, “The Eye that Cries”: The Politics of Representing Victims in Contemporary Peru.”

both the objective and subjective criteria indicated above in the chapter.⁵⁵⁵ That is, every memorialization measure undertaken for the remedial purpose should be proportionate to the harm which it aims to redress and requires the approval of victims. The effectiveness of commemorations as instruments of reparation is ultimately subordinated to their capacity to listen, and tell the victims' narratives with a high degree of public recognition, taking into account victims' preferences and considering the social context in which they are to take place. Participation processes, consultations with victims, and criteria of proportionality are essential elements for reparation policies to be in line with international standards, and therewith, for wrongdoing governments to comply with their obligations under international law.

At the same time, commemorations have a distinct collective and social dimension, which must also be taken into account. While the incorporation of memory-related initiatives into the framework of reparations may open the latter to their transformative potential, the failure of international bodies in taking into account the double dimension of a duty to commemorate as a remedial tool may eventually lead to unforeseen and undesired negative results within broader social memory processes. The *Castro Castro* case is a case in point. Although the Court attempted to strike a balance between the different requests of the parties, it failed to consider the broader social and collective dimension of the memory-related initiatives. It failed to pay careful attention to the complex nature of memory processes within a society in transition, and instead limited its considerations to an assessment of the impact of memory-related measures on the parties to the case.

As the case suggests, the official sanction of “one memory”, of “one truth”, using the language of one particular set of victims, may have the undesirable result of exacerbating the tension between the victims' demand for reparations and the need for social reconciliation. Moreover, imposing the commemoration of a “judicial truth” established by a supranational entity may alter the complex process of negotiation through which a conflict-riven society achieves a shared view of its common past. The duty to commemorate, as emerging practice, therefore calls for a careful evaluation of its implementation.

⁵⁵⁵ *Supra* in this chapter, para. 2.1.2.

Chapter VI

The Duty to Respect and Protect

Introduction – Debating History

History is a highly contested field of research. Different accounts of historical facts, different interpretations of events, and different narratives of the past coexist, clash, and compete against each. These history battles not only are rooted in academic and scientific ambitions, but also fought for political and social reasons. The way history is studied, analysed, and discussed in society, and taught in schools impacts on the way the past is perceived, understood, and represented. It eventually affects the way memories about traumatic events of the past take shape.⁵⁵⁶ History, as we have seen in the theoretical chapter of this thesis,⁵⁵⁷ is closely related to the construction of cultural identity. It is, therefore, an influential instrument of power. This is why governments, especially non-democratic ones, have always shown a special interest in history-management policies: “He who controls the past, controls the present”.⁵⁵⁸ Although it is a science – and because it is a science –, history is – and should be - subject to revisions, discussions, and reassessments over time. Following the Millian paradigm which says that to find the truth we should challenge the truths, accounts of the past should never been taken as axiomatic, unquestionable realities.⁵⁵⁹ The story of the Katyn massacre teaches us the fallibility of even long purported narratives. The official history of the 1940 mass murder of Polish prisoners of war detained in the special prisons of the Soviet NKVD (the soviet secret police that preceded the KGB) told the story of the Nazis’

⁵⁵⁶ This is very important with regard to what Jay Winter calls “cultural memory”, i.e. the social heritage of knowledge about the past that a community shares without having directly witnessed that past. It differs from what the author calls “communicative memory”, which entails a transmission of knowledge about the past from direct witnesses to the next generation, through personal memories, narratives, and stories. Conversation with Jay Winter, European University Institute, Florence, 24 March 2014. Winter bases this reflection on the theory about the distinction between communicative and cultural memory firstly elaborated by Jan Assmann. Assmann, J. “Collective memory and Cultural Identity”.

⁵⁵⁷ *Supra*, Ch. I.

⁵⁵⁸ Orwell, G., *Nineteen eighty-four*, ed. Davison, P. (London: Secker & Warburg, 1987).

⁵⁵⁹ Mill, J.S., *On Liberty*, eds. Bromwich D., and Kateb G., (New Haven; London: Yale University Press, 2003).

responsibility for those horrible facts. Only in 2010, after seventy years of lies, Russia admitted the responsibility of the Soviet leaders at that time.⁵⁶⁰

In a different perspective, a true and open discussion on history is not only intrinsic to the nature of the historical research, but is also protected on the basis of liberal values. Inherent to every democratic system is that public discussion on matters of collective interest is encouraged and facilitated by instruments of democratic participation. Every position and idea, even the more radical ones, can be voiced and confronted within the appropriate social *fora*, so as to be accommodated within - and possibly tempered by - the democratic confrontation of opinions and ideas. Freedom of opinion and expression has been enshrined in the list of fundamental freedoms of human beings exactly to protect this fundamental principle of liberal democracies.

On the other hand, however, such a fundamental liberty has to be balanced against other equally-important competing interests. On this basis, it has been argued that questioning and disputing the past should have limits. At the individual level, the denial of historical traumas constitutes an additional harm to the victims' suffering. It deprives victims of due respect to their memories and reopens wounds. In this perspective, the right to honour and reputation may therefore provide a ground to limit – under certain conditions – the freedom to publicly circulate narratives about the past. At the collective level, malicious views that deliberately aim at distorting or misrepresenting historically ascertained events amounting to massive human rights violations jeopardize the pedagogical value of the historical debate, and constitute an “assault on truth and memory”.⁵⁶¹ Cultural rights, in this sense, may offer similar grounds for restrictions.

This chapter explores the role of international law in regulating the historical debate with regard to the discussion on historical events that amount to mass atrocities. It is argued that the current regime of international law, through human rights instruments and the practice of international judicial and quasi-judicial human rights institutions, guides states' behaviours

⁵⁶⁰ See the official statement adopted the Russian Duma on 26 November 2010, entitled “On the Katyn tragedy and its victims”. The statement is quoted in the ECtHR decisions in *Janowiec and Others v. Russia*, para. 73.

⁵⁶¹ Lipstadt, D. E., *Denying the Holocaust: The Growing Assault on Truth and Memory*, (New York: Free Press; Toronto: Maxwell Macmillan Canada; New York: Maxwell Macmillan International, 1993). See also Vidal-Naquet, P., *Les assassins de la mémoire: "Un Eichmann de papier" et autres essais sur le révisionnisme* (1930) (Paris: Découverte, 2005).

with regard to the production, circulation, and discussion of historical interpretations of the past. While in principle it requires states to respect and preserve the free debate on history as a value, under certain conditions it poses some limits against the revision of historical facts which are deemed especially meaningful for the international community. It therefore protects specific historical accounts from the possibility of denying them. Because of its relevance in the memory-making processes, this is what I call the state *duty to respect and protect*.

The chapter explores the legal foundations that underlie the double-sided duty to respect and protect history. The analysis revolves around two main questions. Firstly, can states impose restrictions on historical debate? And secondly, do states have an obligation to prohibit certain views about history? In order to address these two questions, after the analysis of the legal foundations of the duty under examination, the Chapter is divided in two main parts. The first one examines the rationale behind, the nature of, and the practice related to the duty to respect freedom in historical debate. The second part conceptualizes the duty to protect history from manipulations and distortions as the outer limit to freedom of historical debate. While the first part specifically delves into the reconstruction of freedom of expression as a guiding principle of the historical debate – therefore as the main legal foundation of the duty to respect -, the discussion about the role and regulation of negationisms, revisionisms, and denial of historical events which amount to gross violations of human rights forms the core of the second part of the chapter. The latter is addressed both from the perspective of the international legal regime and through a glance at the debate at the domestic level. Together with the state practice that offers an account of the debate at the national level, the case law of the European Court of Human Rights provides the lion's share of the materials, although the practice of the other main human rights bodies is also considered, when relevant.

1. The Duty to Respect and Protect – Legal Foundations

In theory, the double-sided duty to respect and protect can be conceptualized by the interpretation of various existing human rights norms in the fields of - *inter alia* - education, cultural and participatory rights, access to information, and the corresponding state duties. Since an extensive account of all of these normative links cannot be provided in these pages, however, this chapter will explore the topic mainly from the perspective of the most common ground which has been used in the practice of international bodies to frame the discussion about guarantees and limits of historical debate. Indeed, most of the practice, both at the

supranational and national level, has placed the question on how to debate history, and what the admissible constraints to the historical debate are, within the legal framework of freedom of expression. I will therefore address the subject in this chapter from this viewpoint. Yet, because of its relevance for this discussion, and as a means to open future research avenues in this study, I will first make a brief excursion into the field of cultural rights, from the viewpoint of the rights to education and culture, as additional possible grounds to link the regulation of historical debate to the international human rights framework, to be further explored in future studies.

1.1 Right to Culture – Future avenues of research

The strong connection between memory, history, and identity which was explored at the beginning of this study,⁵⁶² suggests that the protection of history may found a logical justification in the protection of cultural identity. The knowledge of the past is part of a people's heritage, and shapes its identity.⁵⁶³ Francioni defines the concept of cultural heritage as

the totality of cultural objects, traditions, knowledge and skills that a given nation or community has inherited by way of learning processes from previous generations and which provides its sense of identity to be transmitted to subsequent generations.⁵⁶⁴

People's history certainly falls in this category. If cultural heritage, as Scovazzi suggests, "may contribute to the formation and preservation of cultural identity and (...) [foster] people's sense of community",⁵⁶⁵ the protection of history therefore becomes a means to ensure and protect the peoples' right to cultural identity. Stemming from this argument, the legal regimes of cultural heritage protection, especially the intangible heritage regime, may offer a first frame of reference to explore state duties with regard to the regulation of history.

Following the recent developments of this branch of law in respect of the history of serious, large-scale human rights violations, it can be argued that the legacy of past atrocity forms part not only of the cultural identity of the groups which personally lived through those

⁵⁶² *Supra*, Ch. I, para. 1.3.

⁵⁶³ CHR, *Updated Set of Principles to Combat Impunity*. See also *supra*, Ch. IV.

⁵⁶⁴ Francioni, F., "Culture, Heritage and Human Rights: An Introduction", in *Cultural Human Rights*, eds. Francioni F. and Sheinin, M. (Leiden; Boston: Martinus Nijhoff Publishers, 2008).

⁵⁶⁵ Scovazzi, "The Protection of the Underwater Cultural Heritage: An Italian Perspective", in "The Illicit traffic of cultural Objects in the Mediterranean", eds. Vrdoljak, A. and Francioni, F., EUI Working Paper, at 91.

events, but also of the heritage of the whole international community that those events have a significant impact on shaping identity. It is undeniable that the history of the Holocaust has not only dramatically shaped the identity of the Jewish people, but today constitutes an important part of the history of the whole of humanity. Similarly, the histories of the Armenian massacre, the atrocities against aboriginal communities in Australia, as well as the ethnic wars in the Balkans and Rwanda, unquestionably place a heavy burden on the memory and identity of humankind. History, in this sense, is protected in the general interest of the whole human community. This is in line with the emerging idea of cultural heritage as “common heritage of humanity.”⁵⁶⁶

Yet, looking at history through the lens of the states’ obligations in the cultural rights field causes complex issues, especially regarding the respect and protection of diversity and minority rights. How to ensure that different interpretations of the past are similarly protected as part of peoples’ cultural identities, while at the same time ensuring that certain ascertained historical truths are protected against revisionisms, in the interest of humanity? Whilst the domain of cultural protection seems a fruitful framework to explore the interrelationship between history, memory, and related states’ obligations further, a more thorough and careful elaboration of this normative ground and its conundrum is required in the future.

1.2 Right to Education – Future avenues of research

The most powerful instrument in the hand of governments to transfer knowledge is education. Hence, the international legal framework which governs this domain necessarily provides normative grounds to define states’ obligations in the regulation of circulation of knowledge, including history. In shaping and deciding which narratives are to be included in education curricula, and taught in classrooms, governments may – and actually do – play a crucial role in the way generations perceive, represent, and discuss the past. In Japan, for

⁵⁶⁶ Francioni, “Culture, Heritage and Human Rights”, 8 and Francioni, F., “Beyond State Sovereignty: The Protection Of Cultural Heritage As A Shared Interest Of Humanity”, *Michigan Journal of International Law* 25, no.4 (2004): 1209-1226. In this sense, for instance, the European Court of Human Rights, in *Beyeler v. Italy* referred to the “general interest to universal culture” and to the “cultural heritage of all nations”, in relation to the state duty to facilitate public access to culture. ECtHR [GC] *Beyeler v. Italy*, App. No. 33202/96 Judgment of 5 January 2000, para. 113, quoted in ECtHR, Research Division, “Cultural rights in the case-law of the European Court of Human Rights”, January 2011.

instance, the shameful history of the abuses committed by the Japanese military forces against the so-called “comfort women” during WWII was neglected in history textbooks adopted in public schools for half a century.⁵⁶⁷ This exclusion contributed to maintaining the veil of ignorance, silence, and impunity over this abhorrent history, and until now feeds heated debates in the public sphere about how history should be taught in schools.⁵⁶⁸

Education, *ça va sans dire*, is a highly political field, on which states are keen to keep, in principle, *domain réservé*. Nonetheless, with the progressive development of human rights norms and standards, governments are to confront the international legal framework when they are to decide content and means of domestic education policies. The right to education, in the narrow sense referring to formal teaching in schools and educational institutions, is firstly guaranteed in general terms by article 26 of the Universal Declaration of Human Rights, which recognizes it as belonging to every individual. Its qualifying characteristics are then delineated by article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁵⁶⁹ principle 7 of the Declaration of the Rights of the Child,⁵⁷⁰ and articles 28 and 29 of the International Convention on the Rights of the Child (CRC);⁵⁷¹ and, to some extent, article 18(4) ICCPR. At the regional level, the right to education is protected in all the three main regional systems of human rights protection.⁵⁷² A considerable *corpus* of other

⁵⁶⁷ After decades of strategic, programmatic official denial by the Japanese government, the “comfort women” issue came to the public surface at the beginning of the nineties, when some of these women started seeking redress in courts, piercing the veil of silence by speaking their history aloud. The Japanese government publicly recognized the state responsibility for those facts only in 1993, after an official report was eventually issued (statement by the Chief Cabinet Secretary, Yohei Kono, 4 August 1993, available at: <http://www.mofa.go.jp/policy/women/fund/state9308.htm> 1 (unofficial translation)). Since then, the history of “comfort women” entered into the official narrative of WWII. On the comfort women issue, see Shim, Y., “From Silence to Testimony: The Role of Legal Institutions in the Restoration of the Collective Memories of Korean ‘Comfort Women’”, in *Legal Institutions and Collective Memory*, ed. Karsted, 135-157.

⁵⁶⁸ Recent studies on Japanese history and education have noted a progressive omission of this history in the most recent textbooks. See Nozaki, Y. “Japanese Politics and the History Textbook Controversy, 1945-2001”, in *History Education and National Identity in East Asia*, ed. Vickers, E. (London, Routledge: 2005), 290 -299 and Fujimura-Fanselow, K., ed., *Transforming Japan: How Feminism and Diversity Are Making a Difference*, (Feminist Press, 2011), 213-228.

⁵⁶⁹ UN GA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>.

⁵⁷⁰ UN GA, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV), available at: <http://www.refworld.org/docid/3ae6b38e3.html>.

⁵⁷¹ *Convention on the Rights of the Child*, 20 November 1989. United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

⁵⁷² In the Council of Europe, Art. 2, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (P1 ECHR), 20 March 1952, ETS 9, available at: <http://www.refworld.org/docid/3ae6b38317.html> ; in the American system of human rights protection, Art. XII of

international documents restates the right to education in specific cases, and details its content.⁵⁷³ From these overarching norms, two main principles emerge. 1) Education shall be free, and respectful of the cultural identity of the individual and of its freedom; 2) education shall promote human rights values, tolerance, and respect for diversity. These two parameters set the framework for assessing educational programs in the light of human rights standards. Their application to the regulation of the historical debate will provide a snapshot, *prima facie*, of the impact that the international framework on the right to education may have on the states' obligations with regard to history.

Starting with the first principle, freedom in education, it has to be noted that the general provisions on the right to education must be read in the light of the other rights and freedoms enshrined in the main human rights instruments. In this sense, a logical complement to the right to education seems to be found in articles 18 and 19 ICCPR, which promote and ensure freedom of conscience, opinion, and expression.⁵⁷⁴ The combination of these provisions with the recognition of the right to education entails that, while the aims of education should be - among others - to teach respect for human rights, equality, and human dignity, school curricula and programs must also ensure and promote the free formation and circulation of ideas and opinions. Hence, plurality of teaching and education is to be granted as a positive obligation of states. From this perspective, states must guarantee freedom in education to both teachers and students.⁵⁷⁵ The academic freedom of teachers, although not explicitly codified in general human rights instruments within the scope of the right to

the *American Declaration of the Rights and Duties of Man* and Art. 13 of the *OAS Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, "Protocol of San Salvador" (AP ACHR), 16 November 1999, A-52, available at: <http://www.refworld.org/docid/3ae6b3b90.html> ; in the African human rights system, Art. 17 ACHPR.

⁵⁷³ For an analysis of the international legal instruments that contain provisions on the right to education see Dieter Beiter, K., *The Protection of the Right to Education by International Law* (Leiden, Martinus Nijhoff Publishers: 2006). See in particular, foremost and utmost, the work produced by UNESCO in drafting guidelines and standards to regulate education. In this sense, it has been said that, thanks to UNESCO, the right to education is "one of the most precisely defined and efficiently protected" cultural rights. Dieter Beiter, *The Protection of the Right to Education*, at 233, citing Nartowski, A., "The UNESCO system of protection of the right to education." *Polish Yearbook of International Law* 6 (1974): 289-309.

⁵⁷⁴ See also the correspondent provisions in the regional human rights systems, *infra*, Freedom of Expression, para. 1.3. Also, ECtHR, *Case Of Kjeldsen, Busk Madsen and Pedersen v. Denmark*, para. 52.

⁵⁷⁵ CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999. UN. Doc. E/C.12/1999/10, available at: <http://www.refworld.org/docid/4538838c22.html>, para. 39.

education,⁵⁷⁶ has been closely monitored by supervisory human rights bodies.⁵⁷⁷ They have called upon states to enable members of the academic community to transmit their knowledge and ideas free from interference.⁵⁷⁸ From this perspective, it could be argued that restrictions to theories and views than can be taught in class by professors would violate such a freedom. Within this discussion, from the students' perspective, it would also be interesting to inquiry to what extent the right to education entails a right to a truthful and complete knowledge. This critical research question requires further, and more thorough investigation. A more detailed analysis should be thusly conducted on the practice of human rights monitoring bodies, better to interpret the impact of such limitations in the academic historical debate.

Freedom in education is also ensured by the provisions that require states to respect parents' liberty to educate their children in accordance with their personal principles and beliefs, as well as to allow the establishment of educational institutions other than those created by the public authorities.⁵⁷⁹ This is certainly a guarantee against state monopoly over and an assurance of plurality in education.⁵⁸⁰ In this sense, the ECtHR has considered that

[t]he State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.

One can wonder whether historical interpretation of past events that are meaningful for the life of a group can be included within the category of individual "convictions". The Court

⁵⁷⁶ Specifically with regard to the right to education enshrined in Art. 13 ICESCR, the Committee considered that "the right to education can only be enjoyed if accompanied by the academic freedom of staff and students", and therefore explicitly considered this matter under the scope of Art. 13. Art. 15(3) ICESCR nonetheless refers to the state obligation to "respect the freedom indispensable for scientific research and creative activity". CESCR, *General Comment No. 13: The Right to Education*, para. 39.

⁵⁷⁷ For international guidelines on academic freedom, see, in particular, UNESCO, *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, 11 November 1997, available at: <http://portal.unesco.org/en/ev>, Figures VI(A) and VII.

⁵⁷⁸ See, in particular, the Concluding Observations of the CESCR. For specific references, see Dieter Beiter, *The Protection of the Right to Education*, at 599-600. See also, *inter alia*, ECtHR, *Cox v. Turkey*. App. No. 2933/03. Judgment of 25 May 2010; *Sapan v. Turkey*. App. No. 44102/04. Judgment of 8 September 2010, para. 34; *Sorguç v. Turkey*. App. No. 17089/03. Judgment of 23 June 2009, para. 35 ; HRC, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*. Comm. Nos. 422/1990, 423/1990 and 424/1990, UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996), paras. 7.3-7.5.

⁵⁷⁹ Art. 13(3) and (4) ICESCR; Art. 18(4) ICCPR; Art. 2 P1 ECHR; Art. 12(4) ACHR; Art. 13(4) and (5). See also ECtHR, *Case Of Kjeldsen, Busk Madsen and Pedersen v. Denmark*, para. 50.

⁵⁸⁰ See also the *travaux préparatoires* to both ICCPR and ICESCR on this aspect.

has suggested that the term ‘convictions’ “denotes views that attain a certain level of cogency, seriousness, cohesion and importance”.⁵⁸¹ Whilst the interpretation of the past is certainly a serious, important, and cogent matter for the identity of individuals and groups, it is doubtful whether – and maybe even risky to think that – a certain interpretation of the past may seek protection under the banner of ‘philosophical convictions’. This would range the scientific research methods in interpreting the past as a matter of ‘beliefs’. Nonetheless, even if one agrees with this interpretation, the Court has been clear in stating that not all convictions are worthy of protection, but only those which are in line with the principles and values of a democratic society and human dignity.⁵⁸² From this perspective, the qualification of historical denial as a form of violence, as we will discuss later in this chapter, would eventually allow – and maybe even require – the state to exclude revisionist theories from education systems. This leads us to the second principle in the regulation of the right to education: respect for human rights values and cultural diversity.

The provisions for education enshrined in the main human rights instruments, while generally silent on the content of the right to education (i.e. about the content of school curricula and education programmes),⁵⁸³ univocally coincide in requiring that education is in line with human rights values.⁵⁸⁴ This means that pseudo-educative programmes and teaching which are contrary to the respect for human dignity, multiculturalism, and diversity cannot be shielded by the protection of the right to freedom of education.⁵⁸⁵ The anti-discrimination doctrine, in this sense, seems to play a key role in assessing also education curricula.

⁵⁸¹ ECtHR, *Campbell and Cosans v. United Kingdom*. App. Nos. 7511/76 7743/76. Judgment of 20 February 1982, para. 36.

⁵⁸² Ibid.

⁵⁸³ The setting and management of education policies in fact rest in the hands of states. See e.g. ECtHR, *Case Of Kjeldsen, Busk Madsen and Pedersen v. Denmark*. App. Nos. 5095/71 5920/72 5926/72 Judgment of 7 December 1976, para. 50, in which the Court maintained that “that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era”.

⁵⁸⁴ Art. 26(2) UDHR; Art. 13(1) IECSCR; Art. 29 CRC.

⁵⁸⁵ On these grounds, on some occasions, the CESCR has considered that the education programs of some countries did not adequately comply with these values, and therefore recommended governments to undertake appropriate measures to improve the quality of education systems. E.g. CESCR, *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights: Georgia*, 9 May 2000. UN Doc. E/C.12/1/Add.42 (2000), para. 31.

Discriminatory, racist, or hate teaching runs counter to the guiding principles of the right to education, as framed in the international human rights system. And indeed, anti-discrimination laws also pay particular attention to education. State obligations in the field of education are in fact addressed in most of the international instruments which provide protection against discrimination.⁵⁸⁶ They mostly require governments to adopt measures to prevent and combat forms of discrimination when regulating education systems. Although these provisions have been mainly interpreted as referring to eliminating discrimination in access to, and enjoyment of education, I believe that the antidiscrimination argument can be also extended to the content of education.⁵⁸⁷

Bringing this discussion back to the main subject dealt with in this chapter – states' duties in the regulation of the historical debate –, if one understands historical revisionisms as a form of racial discrimination or incitement to hate and violence, as will be discussed later in this chapter, the anti-discrimination and human rights-respect arguments may justify the recognition of a state obligation to preserve certain historical narratives from revisionist theories, especially in education contexts. This, as a result, would ultimately legitimate governments to restrict the circulation of negationist messages in teaching and textbooks. If the denial of historical injustices constitutes a form of hate speech, capable of inciting violence and hatred, its teaching in schools in effect would greatly jeopardize the goal of education as a tool for enhancing respect for human dignity.⁵⁸⁸

While more aspects of this discussion deserve further investigation and elaboration, the interpretation of the two main principles that regulate the field of education under the international legal framework – i.e., on the one hand, freedom and plurality of education, and

⁵⁸⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 5(e)(v) and Art. 7; *Declaration on the Elimination of All Forms of Racial Discrimination*, 20 November 1963, UN. Doc. A/RES/1904, available at: <http://www.refworld.org/docid/3b00f06558.html>, Artt. 3 and 8; *Declaration on the Elimination of Discrimination against Women*, 7 November 1967, UN. Doc. A/RES/2263(XXII), available at: <http://www.refworld.org/docid/3b00f05938.html>, Art. 9; *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 18 December 1979, UN. Doc. A/RES/34/180, available at: <http://www.refworld.org/docid/3b00f2244.html>, Art. 10.

⁵⁸⁷ And indeed, this is made explicit in Art. 10 CEDAW, which binds states to ensure the elimination of discriminatory and stereotyped models from education, including “the revision of textbooks and school programmes”. The same provision is reflected in Art. 12(1)(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

⁵⁸⁸ And indeed, while the content of academic freedom referred to above includes a wide margin of independence and autonomy for scholars to conduct and disseminate research and ideas, also through teaching, it has been underscored that such a freedom comes with obligations, including the prohibition of discrimination. CESCR, *General Comment No. 13: The Right to Education*, para. 40.

on the other hand, respect of and protection for human values and diversity as the ultimate goal of education – seem to concur on the exclusion of teaching that purports discriminatory and violent messages from education. This exclusion may also target hatred narratives that are dressed up as historical theories. However, these restrictions seem to constitute only *extrema ratio* exceptions to the liberal principle of freedom in education, which is the basis of the international human rights system. All this considered, and in anticipation of further investigation, the right to education seems to offer *prima facie* clear legal grounds to shape state duties in regulating the historical debate.

1.3 Freedom of expression

As mentioned above, the main legal ground which has been used to set the discussion on the regulation of historical debate within the human rights discourse has been freedom of expression. Freedom of expression (FoE) is recognized and protected as a core value for the protection of civil, political, and cultural rights by the main international and regional human rights instruments. In Chapter III of this study, when we discussed this fundamental freedom from the specific angle of freedom of information, we had the chance to indicate its normative bases in the main human rights texts. Article 19 of the Universal Declaration of Human Rights firstly grants the right to freedom of opinion and expression to every individual. This twofold entitlement recognizes the freedom to hold opinions without interference, as well as the right to freely disseminate information and ideas – freedom of speech.⁵⁸⁹ It finds similar recognition in all the main human rights instruments: Article 19 of the ICCPR, Article 10 of the ECHR, Article 13 of the ACHR, and Article 9 of the ACHPR.⁵⁹⁰ Such a fundamental freedom protects what has been called the free market of ideas and opinions within a democratic society, which theory is best explained by Justice Holmes’ oft-cited quote:

[T]he ultimate good desired is better reached by free trade in ideas —that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their

⁵⁸⁹ UDHR, Art. 19.

⁵⁹⁰ Also, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>, Art. 11; IACommHR, *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: <http://www.refworld.org/docid/3ae6b3710.html>, Art. IV.

wishes safely can be carried out. That at any rate is the theory of our Constitution.⁵⁹¹

One of the rationales behind its protection is certainly the safeguarding of public debate. It relies on the theories advanced by John Stuart Mill in *On Liberty*, according to which even the most widely recognized truths may – and perhaps should – be challenged in a democratic society, as the struggle for truth is best served by the continuous discussion of existing beliefs.⁵⁹² As such, freedom of expression is a powerful instrument to prevent governments from imposing official truths, and allow individuals to question and dispute matters of public interest. This is clearly especially relevant for the discussion on history, particularly in contexts where authoritarian regimes manipulate historical findings to construct and impose official accounts of past gross human rights violations.

Although a fundamental freedom crucial to democracy, freedom of expression is not an absolute right. Both the UDHR and the general human rights instruments admit restrictions to free speech in order to protect other competing rights and interests. Article 29 of the Universal Declaration provides that limitations to rights and freedoms recognized thereby shall be admissible insofar they are prescribed by law, and justified by the protection of other individuals' rights and freedoms and the need to safeguard morality, public order, and general welfare in a democratic society.⁵⁹³ The main general human rights conventions provide similar conditions for legitimizing restrictions to free speech.⁵⁹⁴ In general, these limitations have to fulfil the conditions of legality (restrictions must be determined by law), legitimacy (restrictions can be imposed only to serve one of the legitimate interests indicated by the treaties: respect for other people rights and freedoms; public order and security; public health or morals), and necessity (restrictions must respond to a pressing social need of a democratic society).⁵⁹⁵ Restrictions, moreover, must be proportionate to the aim they pursue.

⁵⁹¹ Justice Holmes, *Abrams v. United States*, Dissenting Opinion, 250 U.S. 616 (1919)

⁵⁹² Mill, *On Liberty*.

⁵⁹³ UDHR, Art. 29. See also *Supra*, Ch. III.

⁵⁹⁴ Permissible restrictions to freedom of expression are provided by Art. 19(3) ICCPR; Art. 10(2) ECHR; Art. 13(2)(a)(b) ACHR.

⁵⁹⁵ This is the interpretation given on the necessity requirement by the ECtHR. ECtHR, *Sunday Times v. UK* (I), App. No. 6538/74. Judgment of 26 April 1979, para. 62. The Court has further summarized the criteria for assessing the necessity of restrictions imposed to freedom of expressions in *Stoll c. Suisse*[GC], App. No. 69698/01. Judgment of 10 December 2007, para 101. For a discussion of the necessity test in the ECtHR case law, see, *inter alia*, Gerards, J., "How to improve the necessity test of the European Court of Human Rights." *J•CON* 11, No. 2 (2013): 466–490.

The provisions concerning freedom of expression have been used to regulate a set of different juridical situations and interests, both at the individual and at the collective level. With regard to historical debate, the legal discipline of freedom of expression influences the way states are expected to deal with the discussion on the past within society. While the extension of the scope of freedom of expression to the field of history firstly expects governments to respect and ensure the free and open discussion of issues of historical relevance, the construction of a legal regime of the historical debate on the basis of freedom of expression means that any constraint imposed on it has to meet the general requirements that apply to FoE's restrictions. The specificity of this subject, however, requires some adjustments, and special attention is to be paid to the way the general rules on FoE are to be interpreted. It is therefore important to see how these principles actually have been interpreted and applied in the practice of supranational bodies in regulating the historical debate.

2. The Duty to Respect - Ensuring Freedom in Historical Debate

2.1 Rationale: the individual and collective dimension

Freedom of researching and discussing historical facts – i.e. freedom of historical debate - is considered a value of democratic societies. Not only is ensuring freedom in historical debate a precondition for enhancing other protected values – public interest to know, right to access to information, right to an impartial education, academic and scientific freedom -, but it is also considered an end in itself. The rationales for protection are found at both the individual and collective level. On the one hand, at the individual level, the free discussion of history receives protection under FoE provisions as “every form of idea and opinion capable of transmission to others”;⁵⁹⁶ historians, as every individual, are free to shape, develop, and express their own opinions without interference from authorities and without discrimination. Stepping to a higher level, historians are further entitled to academic freedom in their research, which includes the freedom to conduct studies and investigations, to access historical records and archives, to develop theories, and disseminate results. Of course, these individual rights to freely investigate and discuss the past are not limited to historians, since they belong to every

⁵⁹⁶ HRC, *General Comment No.34*, para. 11.

individual. Yet, as we will see in the implementation of this duty in practice, the professional background of the right-holders leads to a higher level of protection.⁵⁹⁷

On the other hand, however, freedom of historical debate is crucial for the development of democratic society, especially in context of transitions. It has been widely argued that, in order to overcome past traumas, societies should face their history.⁵⁹⁸ As a consequence, an open and honest discussion about the past is an essential element of the broader process of transitional justice. Even in democratic societies, however, the free discussion about the past is a guarantee for democratic values. From this viewpoint, freedom of historical debate is not just the expression of an individual right, but it serves the paramount interest in the search for historical truth of the whole society. As I have already discussed at the outset of this work, this touches on the core of collective identity.⁵⁹⁹ This argument puts historical debate among the interests deserving special legal protection for the collective's sake.

2.2 The nature of historical debate

The nature of the epistemological endeavour for historical truth necessarily influences the contours of its protection. Genuine historical research requires a continuous work of analysing, evaluating, discussing, and questioning evidences, and interpreting facts. A certain degree of uncertainty, and the constant development of knowledge, are therefore intrinsic to the work of historians in interpreting and making sense of the past. For that reason, they have received protection in courtrooms. The Spanish *Tribunal Constitucional* meaningfully describes historical research as “always, by definition, controversial and debatable, since it arises from statements and judgments, whose objective truth is impossible to claim with full certainty”.⁶⁰⁰ Not only this uncertainty is acknowledged as “consubstantial to the historical debate”, but it is also considered “the most valuable asset” of historical research, that is

⁵⁹⁷ See, for instance, ECtHR, *Karsai v. Hungary*. App. No. 5380/07. Judgment of 1 December 2009, para. 36; *Affaire Orban et autres c. France*. App. No. 20985/05. Judgment of 15 January 2009; see also *Perinçek v. Switzerland*, in which the Court took into account the professional profile of the applicants to determine the public interest in receiving their declarations. App. No. 27510/08. Judgment of 17 December 2013.

⁵⁹⁸ *Inter alia* see Teitel, R., *Transitional Justice* (Oxford; New York: Oxford University Press, 2000); Hayner, *Unspeakable Truths*; De Greiff, *The Handbook of Reparations*.

⁵⁹⁹ *Supra*, Ch. I.

⁶⁰⁰ *Tribunal Constitucional de España*, Judgment No. 235/2007, 7 November 2007, *Fundamento Jurídico* 8 (translated by the author). The Court thereby reiterates the position already expressed in Judgment No. 43/2004, 23 March 2004, *Fundamento Jurídico* 5.

worthy of respect and protection because of the essential role it plays in shaping a historical awareness in a free and democratic society.⁶⁰¹

This view has also been endorsed at the international level, and the dialogic nature of the historical debate in the search for historical truth has received legal recognition and protection in supra-national human rights bodies as well. The European Court of Human Rights, for instance, in the relevant cases, has confirmed the inconclusive character of the search for historical truth. In line with the Spanish approach, it has consistently understood historical research as “a sphere in which it is unlikely that any certainty exists”,⁶⁰² and has therefore considered the “continuing debate between historians that shapes opinion as to the events which took place and their interpretation” connatural to the struggle for truth, and – as such – worthy of protection.⁶⁰³ The question is therefore whether – and to what extent – states may impose legitimate restrictions on this continuous work of revision and discussion.

2.3 Regulating the historical debate

2.3.1 The international legal framework

Human rights bodies have been suspicious of similar restrictions. In various *fora*, they have expressed concerns about restrictive measures aimed at limiting the discussion of history. In this sense, the FoE UN Special Rapporteur, Frank La Rue, has made clear that:

With regard to discussion of history, the Special Rapporteur is of the view that historical events should be open to discussion (...). By demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events.⁶⁰⁴

In the Report, La Rue refers to General Comment No. 34, in which the Human Rights Committee in fact judged the laws that criminalize the expression of opinions about historical

⁶⁰¹ Ibid.

⁶⁰² ECtHR, *Monnat v. Switzerland*, App. No. 73604/01. Judgment of 21 September 2006, para. 63. In *Perinçek v. Switzerland*, the Court restated this position: «En tout état de cause, il est même douteux qu’il puisse y avoir un « consensus général », en particulier scientifique, sur des événements tels que ceux qui sont en cause ici, étant donné que la recherche historique est par définition controversée et discutable et ne se prête guère à des conclusions définitives ou à des vérités objectives et absolues» (para 117); see also para. 101.

⁶⁰³ ECtHR, *Chauvy And Others v. France*, App. No. 64915/01, Judgment of 29 June 2004, para. 69.

⁶⁰⁴ UN GA, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 7 September 2012, UN Doc. A/67/357, para. 55.

facts incompatible with the obligations concerning freedom of opinion and expression posed on states by the Covenant. In that Comment, by analysing the limits to freedom of expression enshrined in paragraph 3 of Article 19 ICCPR, the Committee put forth a narrow interpretation of the scope of permissible restrictions to freedom of expression in certain specific areas. With regard to historical research and discussion, it remarked that the Covenant protects every opinion on, or interpretation of past events and their expressions, even when these expressions are erroneous and incorrect.⁶⁰⁵ While general prohibitions of historical views are inadmissible, limitations to these views are to be assessed on a case by case basis through the lens of the criteria spelled out in Articles 19(3) and 20. With the outer limit of hate or racist speech – that I will discuss later in the chapter –, the presumption of protection for freedom of opinion and expression about historical facts therefore should be considered the guiding principle for the regulation of the historical debate under international human rights law.

At the regional level, in the framework of the human rights discourse, the ECtHR has developed the richest case law on this matter. From its case law, it is possible to derive guiding principles and criteria that inform the regulation of the historical debate. Thus, the analysis of its jurisprudence in more detail is worth devoting a few paragraphs to.

2.3.2 - The European Court of Human Rights' case law

The Court firmly considers historical debate as an integral part of freedom of expression, and, as such, it protects it against illegitimate interferences and manipulations.⁶⁰⁶ The starting point for this protection is, of course, Article 10.⁶⁰⁷ This provision recognizes freedom of expression and stipulates the conditions for permissible restrictions as follows:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

⁶⁰⁵ HRC, *General comment No. 34*, para. 49.

⁶⁰⁶ ECtHR, *Perinçek v. Switzerland*, para. 99; *Monnat v. Switzerland*, para 57; *Chauvy and Others v. France*, para. 69; *Ungváry and Irodalom Kft. v. Hungary*, App. No. 64520/10. Judgment of 3 December 2012, para. 63

⁶⁰⁷ ECHR, Art. 10 – Freedom of Expression.

information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁶⁰⁸

The Court has interpreted and applied these criteria for scrutinizing restrictive measures imposed by states to utterances that purported historical interpretations of past events. This case law provides the backdrop for singling out the scope and limits of the protection of freedom of historical debate.

2.3.2.1 The principle: Freedom of historical debate

When reviewing the case law, it should become clear that the European Court of Human Rights highly values freedom of history and protects it. The historical debate is protected and regulated as an integral part of freedom of expression. As such, in line with the Court's jurisprudence on FoE, the protection also extends to historical interpretations and views that can offend, shock, or disturb.⁶⁰⁹ While constantly refusing the role to adjudicate on matters of historical nature, the Court rejects the idea that the historical debate – being open and dialogic by nature – be crystallized in “*vérités objectives et absolutes*”.⁶¹⁰ As a consequence, to preserve the plurality of the discussion, it protects minority views, which animate the debate on historical events that are still under discussion, from illegitimate interferences of the states.⁶¹¹

The Court protects freedom of historical debate under both the individual and collective rationales mentioned above. It not only shelters alternative historical accounts under the guarantee of Article 10 as a form of protection of the individual freedom of expression, but it also highlights the social value of having a plurality of voices and narratives discussing the past. It therefore protects an open debate on history as both a legitimate interest and a duty of every democratic society.⁶¹² On various occasions, the Court recalled “the efforts that every

⁶⁰⁸ Ibid., para. 2

⁶⁰⁹ ECtHR, *Ungváry and Irodalom Kft. v. Hungary*, para. 63; *Lehideux and Isorni v. France*, App. No. 24662/94, Judgment of 23 September 1998, para. 55; *Monnat v. Switzerland*, para. 63; *Perinçek v. Switzerland*, para. 103.

⁶¹⁰ *Perinçek v. Switzerland*, para. 117 .

⁶¹¹ *Dink v. Turkey*, App. No. 2668/07, Judgment of 14 September 2010, para. 132.

⁶¹² *Lehideux and Isorni v. France*, para. 55; *Monnat v. Switzerland*, para. 64; *Orban et al. v. France*, para. 53; *Perinçek v. Switzerland*, para. 103.

country must make to debate its own history openly and dispassionately”,⁶¹³ especially (but not exclusively) in contexts of countries engaged in democratic transition. In 2001, in a case against Slovakia, the Court upheld the view that the way the history of a nation – especially with regard to periods of authoritarianism and violation of democratic values - is discussed in the public sphere may affect the democratic development of that country in the future. In this sense, historical debate is seen as a form of political discussion, in which freedom of expression has the highest importance in strengthening and safeguarding a democratic society.⁶¹⁴ The Court has also applied this democratic argument when dealing with the sensitive debate about the Armenian genocide in Turkey. In that context, freedom of historical debate has provided a basis for striking down restrictive measures imposed by the Turkish government on journalists and researchers which had disputed the official narrative of the Armenian massacre in 1915.⁶¹⁵

On the basis of this democratic argument, the Court has stressed the importance of affording that debate a high level of protection. In cases concerning debates on matters particularly relevant for the history of a country, the Court has strengthened the guarantees provided by Article 10, tipping the balance between competing rights and interests toward freedom of historical debate. In *Karsai v. Hungary*, for instance, as we have seen when discussing the right to access public information,⁶¹⁶ the Court extended the special protection granted to the press in view of its function of “social watchdog” to a historian who had published an article in which he criticized some of the national press, naming some names, for making anti-Semitic statements. The article was situated in the context of a high-spirited debate in the country about the Hungarian role in the Holocaust, but it was impugned and sanctioned for violating the right to reputation of one of the persons criticized. In the background of the case, there was the heated discussion about “the intentions of a country, with episodes of totalitarianism in its history, to come to terms with its past”.⁶¹⁷ The Court

⁶¹³ *Perinçek v. Switzerland*, para. 103; *Orban et al. v. France*, para. 52, *Monnat v. Switzerland*, para. 64 ; *Lehideux and Isorni v. France*, para. 55.

⁶¹⁴ ECtHR, *Feldek v. Slovakia*, App. No. 29032/95. Judgment of 12 July 2001, paras. 81-86. Similarly in *Ungváry and Irodalom Kft. v. Hungary*, para. 63.

⁶¹⁵ *Dink v. Turkey*; *Altuğ Taner Akçam v. Turkey*. App. No. 27520/07, Judgment of 25 October 2011; *Cox v. Turkey*. App. No. 2933/03. Judgment of 20 May 2010.

⁶¹⁶ *Supra*, Ch. III.

⁶¹⁷ ECtHR, *Karsai v. Hungary*, para. 35.

valued such a debate as one “of the utmost public interest”, and, on these grounds, protected the freedom of expression of the historian to the detriment of the right to honour and reputation of the politician who was named in the article.⁶¹⁸ Besides confirming the inclusion of historical debate in the category of matters of public interest, this decision also points out the importance that the Court attributes to the role of professional historians in feeding that debate.⁶¹⁹

Similarly, in *Orban et al. v. France*, the Court considered that the protection of public order and prevention of crimes did not adequately justify the conviction by the French authorities of the author and the editor of a book - *Services Spéciaux Algérie 1955-1957* – in which the former General Aussaresses described the torture and summary executions committed by the French army during the Algerian conflict as a legitimate means of war.⁶²⁰ The domestic courts had convicted the applicants for defence of war crimes and crimes against humanity. Conversely, the Court considered that the book, although certainly controversial, enriched the historical debate on a very sensitive and contested part of the French past. It affirmed that the interest of the public in debating its history was worthy of the greatest protection, and that the restriction imposed by the domestic authorities did not rest on any “pressing social need”; and, on the contrary, may have hindered the public discussion, depriving the society of receiving relevant information on such a significant part of its own history.⁶²¹ Accordingly, it found a violation of Article 10.

The utmost importance recognized to the interest of a democratic society in discussing its history by the Court has therefore outweighed competing interests of different natures. In *Monnat v. Switzerland*, for instance, the Court deemed that the interest of the public in

⁶¹⁸ The same reasoning was also adopted by the Court in *Ungváry and Irodalom Kft. v. Hungary*.

⁶¹⁹ *Karsai v. Hungary*, paras. 35-36. The Court took into account the professional profile of historians also in the cases of *Perinçek v. Switzerland*, para. 112, and in *Ungváry and Irodalom Kft. v. Hungary*, paras. 60, 66.

⁶²⁰ For an analysis of the case and its impact on the French memory of that conflict see Löytömäki, “The Law and Collective Memory of Colonialism”, 1–19.

⁶²¹ ECtHR, *Orban et al. v. France*, para. 53. The same reasoning had been adopted by the Court in *Lehideux and Isorni v. France*, in which it found that the publication of an advertisement supporting the controversial “double game theory” with regard to Marshal Philippe Pétain’s role during the Vichy administration contributed to the “efforts that every country must make to debate its own history openly and dispassionately.” As a consequence, it found that the authors’ conviction by the domestic court constituted a violation of Art. 10.

receiving information about the participation of Switzerland in WWII atrocities through a TV programme justified the infringement of the competing right of the audience to receive objective and impartial information.⁶²² The right to honour and reputation of the others was subordinated to freedom of historical debate also in *Fatullayev v. Azerbaijan* (concerning the 1992 massacre of Azerbaijani civilians by Armenian forces in Khojaly);⁶²³ *Ungváry And Irodalom Kft. v. Hungary* (concerning the debate on the historical responsibility for the Communist regime); and *Giniewski v. France* (concerning the responsibility of the Christian community in the Jewish genocide during WWII).⁶²⁴

Hence, the Court considers it crucial that historical debate on particularly serious events can freely take place in the public sphere. As a consequence, it has outlawed state-imposed restrictions to the public discussion about dark periods of a country's history, since it found that – as we will discuss in detail in the relative section - mere content-based limitations to the historical discussion fail to meet the necessity test of Article 10.⁶²⁵ Read in conjunction with the continuous call for an open and dispassionate discussion of history, this strengthens the protection of freedom in the historical debate by the rationale of protecting democratic values, good governance, and rule of law. It therefore provides a justification for such a reinforced safeguard offered by the Court.

2.3.2.2 Exceptions: Restrictions to historical debate

As we have seen when reviewing the legal framework, freedom of expression admits restrictions. When pursuing legitimate aims, states may therefore limit free speech. The Court grants a certain room for manoeuvring to states in determining the possibility of restrictions.⁶²⁶ Nonetheless, in the context of historical debate, the Court has adopted a rather restrictive approach when scrutinizing restrictions imposed to the circulation of alternative historical narratives in the public debate, including controversial ones, by governments. The way the

⁶²² *Monnat v. Switzerland*, paras. 56-61.

⁶²³ *Fatullayev v. Azerbaijan*, App. No. 40984/07. Judgment of 22 April 2010.

⁶²⁴ *Giniewski v. France*, App. No. 64016/00. Judgment of 31 January 2006. But see the opposite approach of the Court in cases of Holocaust denial. *Infra*, para. 3.3.2.

⁶²⁵ *Dink v. Turkey*, para. 135 and, *mutatis mutandis*, *Giniewski v. France*, para. 51. Cfr., however, the opposite approach taken by the Court in Holocaust cases. *Infra*, para. 3.3.2.

⁶²⁶ The Court has delineated the scope of the states' margin of appreciation differently according to the fields to which it applies. While on issues related to religion or morality states can exercise a broad discretion, on political issues the Court retains stricter rules. Lobba, P., "A European Halt to Laws Against Genocide Denial?" *European Criminal Law Review* 4, no.1 (2014): 59-77, at 64.

Court has interpreted and applied restrictions to freedom of speech in this context suggests the *favor* of the Court for protecting freedom of historical discussion. It is interesting to dwell for a moment on the reasoning that the Court supplies to support this argument.

In general, as previously shown in this thesis, the Court has argued that, when ideas and opinions contribute to debates on matters of public interest, there is little space for restrictions.⁶²⁷ Among the three conditions for restrictions – legality, legitimacy, and necessity –, the latter is the key argument when assessing cases involving matters of public concern. The Court has interpreted it as requiring the existence of a “pressing social need” to justify the imposed limitation. This interpretation leaves states with a rather wide margin of appreciation in assessing the existence of such a need. Yet, in cases involving issues of public interest, for which a balance had to be struck between competing relevant rights or related interests and the societal interest in discussing matters of public relevance – both hampered by the protection of Article 10 –, the Court has applied the necessity test with a restrictive approach. In these cases, as we have seen with regard to the public access to information,⁶²⁸ the Court actually has reckoned that the society has a general interest in receiving all the information and opinions – even if fallacious – with regard to those issues, and the societal interest of discussing questions of general importance for the community in fact generally outweighs other individual rights.⁶²⁹ When the issue at stake is a matter of public interest, hence, the necessity test for assessing state-imposed restrictions to the individual freedom of expression is applied stricter.

Because of the inclusion of the historical discussion in the category of issues of public interest, this approach also applies to restrictions to the historical debate. In cases involving the discussion on a country’s past, hence, the significant margin of appreciation that states have in interpreting and fulfilling their obligations under the ECHR is reduced, and leaves them little room to manoeuvre in imposing limitations to that discussion. *Perinçek v. Switzerland* is a good example of the Court’s most recent approach in assessing the necessity requirement in cases of restrictions to the historical debate. In that case, the Court held the

⁶²⁷ ECtHR, *Perinçek v. Switzerland*, paras. 112 – 113.

⁶²⁸ *Supra*, Ch. III.

⁶²⁹ ECtHR, *Ungváry and Irodalom Kft. v. Hungary*, para. 69; *Orban et al. v. France*, para. 54; *Karsai v. Hungary*, para. 37; *Perinçek v. Switzerland*, para. 100.

state responsible for the violation of Article 10 of the Convention for convicting an individual who had questioned the legal qualification of the Armenian genocide. The Court found that the restriction did not respond to a pressing social need of a democratic society.⁶³⁰

Perinçek, a Turkish doctor in law, politician and historian, had on various occasions publicly declared that the genocide of the Armenian people committed by the Ottoman Empire was an “international lie”. In the light of his declarations, the Swiss courts found him responsible for racial discrimination, on the legal basis of a domestic provision that criminalizes genocide denial.⁶³¹ After restating the principles governing the historical debate that were examined in the previous paragraph, the Court classified Perinçek’s utterances as a type of historical, juridical, and political speech. On this basis, it considered that the government’s margin of appreciation in this case was narrow in the light of the public interest in that discussion.⁶³²

The Court then proceeded by applying the ordinary test of Article 10(2) to scrutinize the government’s interference with the applicant’s freedom of expression. Following its previous jurisprudence, the Court restated that, since freedom of historical debate is the rule, every restriction to it has to meet the requirements of legality, legitimacy, and necessity. In this case, while recognizing that the restriction imposed by the domestic courts legitimately aimed at protecting victims’ honour and reputation, it rejected the existence of a “pressing social need” that justified the interference with the applicant’s freedom of expression.

The reasoning of the Court to support its stance relied on two main arguments. Firstly, the Court referred to the recent developments in domestic practice on the issue of historical denial, and contrasted this case with its jurisprudence on the Holocaust cases.⁶³³ It considered that, while cases of Holocaust denial are still perceived as an alarming phenomenon in Europe, which should be controlled and fought by governments as a form of intrinsic anti-Semitism and racism, the denial of the *legal qualification* of the Armenian genocide did not raise the same level of social alarm. To corroborate its claim, the Court indicated recent decisions of

⁶³⁰ A good commentary to this case is provided by Lobba, “A European Halt to Laws against Genocide Denial?”

⁶³¹ Swiss Criminal Code, Art. 261 bis(4). I will address the domestic practice of criminalization of denials later in the chapter. See *infra*, para. 3.1.

⁶³² ECtHR, *Perinçek v. Switzerland*, paras. 132-133.

⁶³³ *Infra*, para. 3.3.2.

national and international bodies which have outlawed criminal legislation punishing historical denial *tout court*.⁶³⁴ While this approach may sound dangerously close to promoting double standards for judging Holocaust denial cases *versus* other cases of genocide denial - as I will further discuss in the section on negationism -, the impact of this reasoning is substantially circumscribed by the crucial fact that the Court is called to decide on the denial of the *legal qualification* of genocide (i.e., a legal dispute over the legal label to be applied to those atrocities, and not over the factual truth about the existence of those events). As such, hence, it can be still wondered what the decision would have been, had the case concerned the denial of the *existence* of the atrocities against Armenian.

Secondly, the Court found that the applicant's statements did not constitute incitement to hatred and violence. Perinçek's utterances, in fact, did neither aim at denying the occurrence of the Armenian massacre nor expressed contempt toward the victims, but they rather focused on the legal qualification of those events, on which there is no general consensus. Consequently, according to the Court, the nature of these statements was not such as to advocate hate against Armenian people.⁶³⁵ This latter criterion indicates the limits of tolerance that a democratic government should have in the historical debate with regard to speech capable of "offend[ing], shock[ing] and disturb[ing]".⁶³⁶ The threshold for restriction to the historical debate therefore seems to lie in the potential harmful nature of the speech, which grounds the existence of a pressing social need.⁶³⁷ As a result, in *Perinçek*, the Court eventually concluded that the public interference imposed by the domestic courts on the applicant's freedom was not necessary in a democratic society. On the contrary, since this kind of restrictions could even end up jeopardizing the discussion of such an important issue in the public sphere, they are, in principle, to be rejected. This decision therefore seems to

⁶³⁴ *Perinçek v. Switzerland*, paras. 120 – 125.

⁶³⁵ *Ibid.*, paras. 51 – 52.

⁶³⁶ The Court has consistently applied this line of reasoning in its jurisprudence. In *Bingöl v. Turkey*, for instance, it argued that a public speech that purported an historical analysis of the Kurd issue contrary to the official narrative could not be restricted by criminal sanctions, since it did not contain any incitement to hate and violence against the government. ECtHR, *Bingöl v. Turkey*. App. No. 36141/04. Judgment of 22 September 2010, para 39. The same position was also restated in *Giniewski v. France*, para. 52.

⁶³⁷ On the harmful nature of the speech and the malicious intent of its author as elements of the crime of denial, see *infra*, para. 3.1. On the ECtHR case law on this aspect and the different approach to Holocaust cases, see *infra*, para. 3.3.2.

corroborate the principle of freedom of historical debate and the restrictive approach to limitation imposed to that discussion.

Overall, as an intermediate conclusion on the Court's case law on historical debate, it can be said that the Court suggests a general presumption of freedom in the historical debate. The interpretative tools the Court uses to foster this protection are: i.) the restrictive approach to the admissible limits to Article 10, favouring the public discussion on history over individual personality rights and other interests; and ii.) the restriction of the states' margin of appreciation in assessing the existence of justifications for applying restrictions to historical debate. From this perspective, the Court case law is in line with the restrictive approach expressed by the HRC and UN bodies that we discussed above.⁶³⁸ As I will discuss in the next section, however, such a generous approach to the historical debate takes a step back when the events disputed relate to the Holocaust.

3. The Duty to Protect – Defending History from Falsifications and Manipulations

In the previous examination, we have seen how international bodies have interpreted human rights norms related to the protection of freedom of expression as an essential effort that every democratic society should make and applied it in order to protect and promote the free and open discussion over the past. However, while the plurality of voices in debating the past has been explicitly considered a value in itself and protected by the firm shield of freedom of expression, the question has been raised as to how states should deal with those voices that purport interpretations of past events that tend to deny, minimize, or justify historical facts that amount to international crimes. By manipulating and distorting reasoning and methods of history and historiography, these voices promote narratives of past atrocities that tend to question historical findings widely verified by authoritative scholarship and commonly accepted as established.⁶³⁹ Negationism(s) can take different forms and show different degrees

⁶³⁸ *Supra*, para. 2.3.1.

⁶³⁹ For a general analysis of this issue, see Lipstadt, *Denying the Holocaust*. See Cohen, S., *States of Denial: Knowing about atrocities and suffering*, (Cambridge: Polity Press; Malden, MA: Blackwell, 2001); Hennebel, L., Hochmann, T., *Genocide Denials and the Law* (New York; Oxford: Oxford University Press, 2011); Guenter, L., *Outlawing genocide denial: the dilemmas of official historical truth*. (Salt Lake City: The University of Utah Press, 2014).

of denial.⁶⁴⁰ Negationist theories can target historical facts or their interpretation; they can ontologically contest the occurrence of a crime (e.g., no ‘final solution’ was planned and perpetrated against Jewish people in WWII), or limit themselves to question data or historical records related to that crime (e.g., the number of Jews murdered in WWII is way below the million); they can target a specific ethnic group, and be accompanied by moral judgment which aims at justifying, approving, relativizing, or trivializing the crimes in question (e.g., Jews invented the Holocaust myth to exploit Germany financially).⁶⁴¹

The question is, once more, whether the law should play a role in outlawing these kinds of (pseudo-)historical opinions, and to prevent their authors from disseminating them. At the domestic level, many states have adopted legislative acts to prohibit and repress denials of,

⁶⁴⁰ Different terminology has been used to refer to the phenomenon consisting in the denial, disputation, minimization, trivialization, justification, or glorification of historical events that amount to serious international crimes. Revisionism, negationism, denial, and denialism – and the relative adjectives to describe the authors of these views – are among the most common terms. It has been observed that ‘revisionism’, or ‘historical revisionism’, may be confusing in a way, since the activity of revision is intrinsic to the endeavors of the historical research. Each historian, according to this view, should therefore be considered a “revisionist” (Fronza, E., “The Criminal Protection of Memory” in *Genocide Denials and the Law*, 161). Negationism is a legacy of the French doctrine on *négalionism*, which has been at the forefront in the discussion about this phenomenon. To the best of my knowledge, the term was first adopted by Henry Rousso, who used it in order to create a distinction between those who attempt to maliciously fabricate historical narratives and *bona fide* historians, whose work of revision of historical facts is informed by the rules of scientific historiographic method. Rousso, *The Vichy Syndrom*, 151 and ff. It has been traditionally associated, however, with theories that mostly dispute the events of the Second World War, and, in particular, those regarding the Holocaust. The phenomenon is, however, broader, since views disputing the existence or the circumstances of historical events amounting to international crimes – genocides, crimes against humanity, and war crimes - have been put forth also with regard to different situations - such as in the cases of the Armenian or Rwandan genocides. Denial and denialism have been used as more neutral terms to indicate, in general, utterances put forth to deny or question a wide array of historical atrocities – often adopting the expression ‘genocide denial’, while referring to contestations of “any other crime against humanity”. (Hennebel, *Genocide Denials and the Law*, 4). Yet, I find that it sounds to be limited only to those theories which dispute the very existence of one or more of these crimes, whilst leaving aside the contestation of relevant circumstances, such as, in the case of the Holocaust, the use of gas chambers or the number of deaths. Since each of these terms has its strengths and weaknesses, in this thesis, I chose not to adhere to any of them in particular, in order to keep a broad understanding of the phenomenon, avoiding context-based and event-based limitations. For this reason, I will often use the plural forms – ‘negationisms’, ‘revisionism’ – to suggest the multiplicity of the phenomena that can fall within these terms. The use of one or the other term to designate this phenomenon in this thesis is by no means intended to cover up utterances that aim at manipulating historical accounts of past atrocity with “a scholarly garb” (Fraser, D. “On the Internet, Nobody Knows You’re a Nazi: Some Comparative Legal Aspects of Holocaust Denial on the WWW”, in *Extreme Speech and Democracy*, ed. Hare, I., Weinstein, J. (Oxford; New York: Oxford University Press, 2009): 511-537, at 516). For a terminological discussion of this phenomenon, see also Belavusau, U., *Freedom of speech: importing European and US constitutional models in transitional democracies* (London ; New York : Routledge, 2013), 168-171.

⁶⁴¹ These were the points that the historian Professor Evans presented to the British benches to summarize the views expressed by Holocaust deniers in the famous libel case *Irving v. Penguin & Lipstadt* (2000) para. 8.4. See Hennebel, L. and Hochmann, L., “Introduction”, in *Genocide Denials and the Law*, p. 3; and Fraser, “On the Internet, Nobody knows you’re a Nazi”, 511-537.

and misgivings about the actual facts of the major atrocities perpetrated in history.⁶⁴² Sidestepping the normative assessment and the capacity of these measures,⁶⁴³ one may question the compatibility of these legislative acts with principles and standards of human rights and fundamental freedoms. In particular, from the legal point of view, the question can be framed as whether the prohibition of negationisms can be conceived as a legitimate restriction to freedom of expression, in accordance with the principles of human rights law outlined in the first part of this Chapter. Before analysing the human rights legal frameworks and practice, the next section presents an account of the debate with regard to the so-called memory laws at the national level. This overview will provide evidence of the domestic practice on the regulation of the historical debate, in the light of which the solutions put forth in the international legal framework can be assessed. The kaleidoscopic picture that will emerge from this review, while suggesting the complexity of providing standards and principles to regulate this issue univocally, offers a viewpoint better to understand the uncertain regulation at the international level.

3.1 The debate at the domestic level

Memory laws are statutes that promote specific historical accounts of past events and/or prohibit the denial of, or the dispute on these narratives through the threat of civil or criminal sanction.⁶⁴⁴ They have been defined as those laws that, in spite of the different content,

semblent procéder d'une même volonté: «dire» l'histoire, voire la qualifier, en recourant à des concepts juridiques contemporains comme le génocide ou le crime contre l'humanité, pour, d'une manière ou d'une autre, faire œuvre de justice au travers de la reconnaissance de souffrances passées.⁶⁴⁵

⁶⁴² An overview of these measures is provided in the next paragraph, *infra*, para 3.1

⁶⁴³ For a normative discussion on whether criminalization of genocides' denial should be desirable or not, see the academic debate between Professors Fronza, E., "The Punishment of Negationism: The Difficult Dialogue between Law and Memory" and Bloch, P., "Response to Professor Fronza's The Punishment of Negationism", *Vermont Law Review* 30 (2006), 609-626, 627—643, respectively.

⁶⁴⁴ It seems that the term is to be attributed to the French writer Françoise Chandernagor, Vice-President of the academic movement *Liberté pour l'Histoire*, who firstly used this meaningful expression in the article "*L'enfer des bonnes intentions*", published on *Le Monde* on 16 December 2005, available at <http://www.lemonde.fr/idees/article/>.

⁶⁴⁵ Accoyer, B., "Rassembler la Nation autour d'une mémoire partagée", Rapport d'information n°1262, 18 November 2008.

They can be given shape either in official, declarative acknowledgments of historical facts, such as the 2001 French Law recognizing the Armenian Massacre as genocide,⁶⁴⁶ or in civil or criminal acts or norms that aim at banning certain views regarding historical events as incompatible with the fundamental values of democratic states. While the first type raises concerns on the capabilities of the law to sanction historical truths,⁶⁴⁷ the latter is more problematic from the legal point of view, since it encroaches upon individual liberties, raising doubts about the legitimacy of these restrictions. The following analysis therefore focuses on this latter form.

The review of the main legal systems with regard to the regulation of negationism reveals a kaleidoscopic landscape. The most liberal approach to this phenomenon comes from the United States.⁶⁴⁸ In that legal system, the principle of freedom of speech, as interpreted by the U.S. Supreme Court, while admitting legitimate legal grounds for restrictions,⁶⁴⁹ submits content-based restrictions to the most rigorous scrutiny under the solid protection of the First Amendment.⁶⁵⁰ In the European context, states have adopted different approaches to the

⁶⁴⁶ Law 2001-70, 29 January 2001, on the recognition of the 1915 Armenian genocide, Official Journal n. 25, 30 January 2001. On this issue, and with regards to debate on negationism in France, see, *inter alia*, Garibian, S. "Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law" *Cardozo Journal of Conflict Resolution* 9, no. 2 (2008): 479-488.

⁶⁴⁷ See *Supra*, Ch. I.

⁶⁴⁸ On the U.S. free speech doctrine, and for a more nuanced interpretation of hate speech regulation in the U.S., see, among others, Weinstein, J., "An Overview of American Free Speech Doctrine and its Application to Extreme Speech" in *Extreme Speech and Democracy*, eds. Hare and Weinstein, 82-95. See also Boyle, K., "Hate Speech--The United States Versus the Rest of the World", *Maine Law Review* 53 (2001): 487-502; Schauer, F., "The Exceptional First Amendment" in *American Exceptionalism and Human Rights*, ed. Ignatieff, M. (Princeton: Princeton University Press, 2005), 29-56. For an analysis of the First Amendment protection on deception in particular types of speech – including Holocaust denial –, see Varat, J., "Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship", *UCLA Law Review* 53, no.5 (2006): 1107 -1141.

⁶⁴⁹ The U.S. Supreme Court, over the years, has singled out some categories of speech which it has considered to fall outside the protection of the First Amendment. These are the so-called "fighting words": incitement; obscenity; child pornography; defamation. The interpretation of these categories, however, has been progressively narrowed down by the Court. For a review of the U.S. Supreme Court case law on free speech and unprotected speech, see Sullivan, K., Gerald G., *Constitutional Law*, 14th ed. (New York: Foundation Press, 2001), 963 and ff; 1154-1163.

⁶⁵⁰ As reported by Boyle, the radical nature of the US approach was well captured in a civil litigation in Idaho, in which the defendant - Reverend Richard Butler - had been accused of incitement to violence. Defending the defence, Butler's lawyer stated: "[D]emonizing Jews is still legal under the First Amendment. It is still legal in this country to be a bigot. It is still legal to hate. Pastor Butler [therefore] quite properly erects the twin defenses of both free speech and religion contained within the First Amendment.", quoted in Boyle, "Hate

question of how to deal with historical negationisms. On the one side, there are states that specifically target revisionist ideologies through administrative or criminal provisions (the so-called *militant democracies*).⁶⁵¹ On the other side, some states have chosen not to introduce specific provisions prescribing the punishment of revisionist or negationist views in their legal systems.⁶⁵² Even in this latter group, however, utterances that aim at maliciously denying, trivializing, or justifying historical events amounting to serious crimes have been frequently repressed under hate speech laws, or on the basis of general domestic provisions punishing conduct that constitutes defamation, breaches of the public order and security, or that encroach upon other individuals' rights.

The rationales behind the choice of whether to proscribe denialisms or not are various, ranging from historical to political and legal arguments. From the latter viewpoint, a number of rationales have been used to justify restrictions to negationist expressions. These grounds provide legal arguments to outweigh the repression of denial against freedom of expression in the balancing endeavour between different rights and interests. It is useful, also in the light of the forthcoming analysis of the case law of international bodies, to spell out the main ones. First of all, the 'public order rationale' has been used by domestic courts to legitimize restrictions. Accordingly, revisionist utterances should be banned since they may constitute a threat to the public order and security.⁶⁵³ From this perspective, negationism is assimilated to racist speech. It is grounded on the presumption that every form of negationism is driven by racially-motivated or discriminatory intent, and aims at provoking hatred and violence. As we will see in more detail in the next paragraphs, this is in fact the most common underlying argument against Holocaust denial, which has provided courts with grounds for admitting restrictions to these utterances even in the absence of explicit denial laws. A second argument grounds the condemnation of revisionist theories of historical crimes on the protection of the rights of the others. In this sense, the denial, justification, or minimization of past atrocities violates the right to honour and reputation of the victims and their heirs. By denying their

Speech", at 489. For the content-based categories of speech which traditionally fall outside the protection of the First Amendment, see Weinstein, "An Overview of American Free Speech Doctrine", 82-83.

⁶⁵¹ See Pech, L., "The Law of Holocaust Denial in Europe: Towards a Qualified EU-Wide Criminal Prohibition." Jean Monnet Working Paper 10/09. (New York, New York School of Law: 2009).

⁶⁵² In Europe: The United Kingdom, Italy, Greece, Bulgaria, Estonia, Finland, Ireland, Malta, and The Netherlands. Furthermore: United States, Canada, Australia, and most of the Latin American and African states (with the exception of Rwanda).

⁶⁵³ See Pech, "The Law of Holocaust Denial in Europe", 43 – 44.

suffering, deniers indirectly (and sometimes even directly) accuse victims of falsity, and insult their memory. Moreover, similar expressions affect not only the individual victims, but the whole group that has been targeted by the violence. The Federal Court of Australia, in a case of Holocaust denial, ruled that

negationist speech challenges and denigrates a central aspect of the shared perception of Australian Jewry of its own modern history and the circumstances in which many of its members came to make their lives in Australia rather than in Europe. To the extent that the material conveys these imputations it is, in my view, more probable than not that it would engender feelings of hurt and pain in the living by reason of its challenge to deep seated belief as to the circumstances surrounding the deaths, or the displacement, of their parents or grandparents. For the same reason, I am satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.⁶⁵⁴

The Court treats denial as a calumnious speech, capable of offending, insulting, hurting, and wounding members of Australian Jewry, and engenders in them a sense of being treated contemptuously, disrespectfully, and offensively.⁶⁵⁵ On the basis of these arguments, restrictions to negationist utterances are thus permissible – and even necessary - as a legitimate limitation to FoE. Thirdly, a more radical argument can be put forth to remove denialist ideologies from the protection of fundamental rights, namely that negationisms pose a threat to the constitutional order, since they aim at rehabilitating or justifying the legal orders that allowed those crimes to happen. These views are therefore considered to run counter to the very fundamental values of democratic states. As such, they fall outside any legal protection.⁶⁵⁶

With regard to the concrete regulation of historical denial, provisions prohibiting and punishing negationisms take different shapes. These differences may concern various aspects

⁶⁵⁴ Federal Court of Australia, *Jones v. Toben*. Judgment of 17 September 2002, FCA 1150, para. 93, quoted in Hennebel, *Genocide Denials and the Law*, 15.

⁶⁵⁵ *Ibid.*, para. 94. Since Australia has not adopted specific legislation on genocide denial, however, the Court ruled on the basis of the domestic Racial Discrimination Act, Section 18C (1975 - Cth).

⁶⁵⁶ Conversely, refusal to restrict negationist speech is also grounded on the protection of democratic values of pluralism and free exchange of ideas. As the Spanish Constitutional Court argued, “[t]he value of pluralism and the need for a free exchange of ideas as the underpinning of the representative democratic system prevent any activity by public powers which would control, select or seriously determine the mere public circulation of ideas or doctrines”. *Tribunal Constitucional de España*, Judgment 235/2007, para. 4).

of the offence.⁶⁵⁷ First, they may regard the object of the law, i.e., the historical event whose narrative is to be protected by the specific provision. Traditionally, repression of negationist speech has been linked to Holocaust denial. The historical heritage of each state mainly explains the differences in the choice of the event(s) whose denial is to be punished.⁶⁵⁸ Not surprisingly, countries such as Germany, Austria, and Belgium have decided to adopt *ad hoc* statutes that prohibit conduct that disputes the atrocities committed against Jewish people in WWII. Eastern European Countries, instead, have been keen to prohibit the malicious inquiry of the crimes committed by the Communist Party.⁶⁵⁹ Rwanda's legislation condemns the denial of the 1994 genocide.⁶⁶⁰ Countries that bear a lighter historical burden, conversely, have often introduced more general provisions, prohibiting the denial of the most serious crimes without making distinctions among the historical events in which they occurred.⁶⁶¹

Second, anti-denial provisions may vary in their scope. They can be as broad as to target the denial of any mass human rights violation whose narrative is protected, regardless of its legal qualification, or can limit the proscription of the denial of specific international crimes, most often genocide.⁶⁶² In this regard, these provisions sometimes specifically require that the historical event whose denial is proscribed be defined as an international crime by an

⁶⁵⁷ For a comparative review of the legislation of European states, see Closa, Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States, table 3.3 .

⁶⁵⁸ Interestingly, both the European Commission and Court of Human Rights have admitted that the historical legacy of a state may legitimately justify, in principle, political decisions that *prima facie* appear to be contrary to the principles of the Convention. See, e.g., ECommHR, *B.H.; M.W.; H.P.; G.K. v. Austria*, App. No. 12774/87, Decision of 12 October 1989, para. 2; ECtHR, [GC] *The Welfare Party and others v. Turkey*, App. No. 41340/98, Judgment of 13 February 2003, para. 124.

⁶⁵⁹ The Czech Republic, Hungary, and Poland, for instance, punish the denial of both Communist and Nazi crimes.

⁶⁶⁰ Law N. 18/2008 adopted on 23 July 2008. The Law is very broad, and condemns a variety of behaviours related to genocide ideology. For this reason, the law has been heavily criticized, and its legitimacy has been questioned by human rights bodies. See Sullo, P. “*Lois Mémoires* in Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny”, *Leiden Journal of International Law* 27, No. 2 (2014): 419-445.

⁶⁶¹ This is the case, for instance, Switzerland; Luxemburg; Cyprus and Spain (this latter, however, as a consequence of the Constitutional Court' Judgment 235/2007, prohibits only the justification of genocide, but not its mere denial).

⁶⁶² E.g. Romania, Slovenia; Poland; Portugal; Cyprus prescribe the prohibition of denial of various serious crimes: genocide, crimes against humanity; crimes against peace; war crimes or other crimes committed by the Nazi or Communist parties. On the contrary, Germany; Belgium; Luxemburg formally condemns only genocide denial. See Closa, *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States*, 50 - ff.

internal, or – more often – an international court.⁶⁶³ This latter requirement may raise questions with regard to the boundaries between law and history, judge and historian, judicial and historical truths. By remitting to the judge the responsibility to define a fact as an “established historical fact”, the contestation of which is prohibited, these provisions eventually dress judicial decisions as historical truths. While this is a complex argument that cannot be addressed in depth in this chapter, its relevance for the present discussion cannot be downplayed, and opens the door for future discussion.

Third, differences among types of anti-denial provisions lie in the *actus reus* of the offence. From this perspective, anti-denial provisions can target either the ‘mere denial’ of a certain historical event amounting to mass human rights violations (content-based restriction),⁶⁶⁴ or condemn only value judgments that aim to justify, glorify, or support that event. While the punishment of the latter type of offence can be justified by the hate speech rationales - as proscription of utterances which incite to violence and hatred -, or on the basis of the right to honour and reputation – as the justification or glorification of those atrocities which inflict new humiliation and suffering on victims and their heirs, the former one poses some complications, since content-based proscription of mere denial may be considered a form of repression of mere opinions, and therefore particularly heinous in democratic societies. The radical difference between these two approaches is well expressed in the heated debated revolving around this point at the level of national constitutional courts, the two opposing positions being represented by the *Tribunal Constitucional* of Spain and the German *Bundesverfassungsgericht*. Whilst the former struck down the part of the domestic genocide denial provision that criminalized mere denial,⁶⁶⁵ since it found it incompatible with the constitutionally protected right of freedom of expression, the latter resolutely rejected the

⁶⁶³ E.g. the Gayssot Act, which introduced into the Freedom of the Press Act Section 24*bis* to punish Holocaust denial, limits the offence by cross-referring to Art. 6 of the IMT London agreement. Law n° 90-615, 13 July 1990, JORF n° 0162, 14 July 1990 p. 8333.

⁶⁶⁴ Content-based restrictions, as opposed to ‘content-neutral’ restrictions in the US doctrine of free speech, are those limitations to free expression driven by the pure content of the speech. Legal provisions introducing content-based restrictions can be hardly reconciled with the principle of the free marketplace of ideas, since they “raise (...) the specter that the Government may effectively drive certain ideas of viewpoints from the marketplace”, *Simon and Schuster v. Members of New York State Crimes Victims*, 502 US 105 (1991). Pech, “The Law of Holocaust Denial in Europe”, 17-18, fn. 48.

⁶⁶⁵ Art. 607(2), Spanish Criminal Code, Ley Orgánica 10/1995, 23 November 1995.

possibility of shielding negationist speech under FoE protection. The argument used by the two courts is the same, but its application led to opposite results.⁶⁶⁶ The legal ground used by both courts was rooted in the distinction between facts and opinions. On the one hand, the *Tribunal Constitucional* considers the mere dissemination of ideas or theories that deny existence of historical facts classified as genocide “mere transmission of opinions”.⁶⁶⁷ The Court found that this kind of utterances do not automatically involve incitement to hatred and violence, or praise of the commission of crimes. As such, their general repression would cause to impose punishment about ideas as such. It consequently found that the criminalization of mere denial runs counter to democratic values. On the other hand, the German Constitutional Court refused to conceive Holocaust denial as the expression of an opinion, but it rather considered it an assertion of fact. On these basis, it argued that, whilst full protection should be accorded to opinions, statements of facts are protected to the extent to which they contribute to the formation of public opinion. The Court judges that utterances that aim at denying the existence of the Jewish persecution are patently untrue statements of facts, and considered them of no interest to society. As such, holocaust denial being an obviously false statement of historical facts, its expression falls outside the protection of the constitutional right to freedom of expression.⁶⁶⁸

Finally, with regard to the elements of the offence, in order to avoid unconstitutionality claims for punishing mere opinions, some national parliaments have further enriched their provisions by requiring an additional element for the prosecution of historical denial. For this kind of expressions to be punishable, some provisions require that they intend to cause, and/or are capable of causing harm to other protected values. This requisite is introduced either in the form of a psychological element - *mens rea* – which requires that the agent acts with the intent to incite hatred, violence, and discrimination,⁶⁶⁹ or as a material element, requiring that the

⁶⁶⁶ The reasoning developed by the two courts are, of course, much more articulated and complex than the argument explained hereby. May the author be forgiven, however, for singling out only one of the arguments – namely the distinction between facts and opinions – for the sake of our discussion.

⁶⁶⁷ *Tribunal Constitucional de España*, Judgment No. 235/2007, *Fundamentos Juridicos* 3 and 6.

⁶⁶⁸ *BVerfGE* 90, 241-255: “Auschwitz lie”, Decision of the 13 of April 1994, BvR 23/94.

⁶⁶⁹ For instance, Israel, Denial of Holocaust (Prohibition) Law, 5746-1986, Art. 2. It punishes the denial of crimes committed by Nazis against Jews people or crimes against humanity when such denial is motivated by the “intent to defend the perpetrators of those acts or to express sympathy or identification with them”. Switzerland, Penal Code, Art. 261bis, which punishes “celui qui aura publiquement, (...) abaissé ou discriminé d’une façon qui porte atteinte à la dignité humaine une personne ou un groupe de personnes en raison de leur race, de leur appartenance ethnique ou de leur religion ou qui, *pour la même raison*, niera, minimisera

conduct constitutes a form of hate speech, discrimination, or threat to public order or the rights of other individuals in fact.⁶⁷⁰ The presence of these requirements, in particular in the form of the objective element of the harm, even if narrowing down the application of anti-denial provisions, offers more solid reasons to argue in favour of their legitimacy. By requiring that negationist views may be punished only if they pose a threat to or harm other interests and rights, norms thusly constructed indicate to the judge the balancing exercise that has to be carried out *in concreto* to assess the necessity for restricting the individual freedom of expression. According to this approach, hence, it eventually rests upon the judge to assess whether, in each specific case, a restriction to the historical debate is needed in a democratic society.⁶⁷¹

In this overview of the state practice on negationisms, we have observed the variety of approaches and legal avenues which are, in principle, available to domestic institutions to regulate this phenomenon. It is now time to look at whether – and how – the international legal framework poses constraints or suggests guidelines and standards to delimit the scope of capabilities of states when dealing with the denial of the history of past atrocities.

grossièrement ou cherchera à justifier un génocide ou d'autres crimes contre l'humanité" (emphasis added). The interpretation of that element of crime has been however widely discussed at the national level, both in the literature and in courts. On this point, see the Federal Tribunal decision, *Doğu Perinçek*, 12 December 2007, ATF 6B_398/2007. The decision refers to previous case law: ATF 123 IV 202 consid. 4c p. 210 et 124 IV 121 consid. 2b p. 125; ATF 126 IV 20 consid. 1d, spéc. p. 26 et 127 IV 203 consid. 3, p. 206. Portugal, Art. 240 of the Criminal Code, Law n°65/98 of 2 September, 1998). In this latter case, however, the denial of serious crimes is punished as a modality of the conduct of the racial defamation crime.

⁶⁷⁰ Germany, for instance, punishes only those conducts that constitute a threat to public peace. German Criminal Code, Section 130(3). Notably, however, domestic courts have ruled that in cases of Holocaust denial such a threat is implicit in the mere denial; in doing so, they therefore expand the scope of the norm till shaping in fact a content-based criminalization of expression, nullifying the material element of threat.

⁶⁷¹ On these bases, the Spanish Constitutional Court, in the above mentioned decision, argued that, while the prosecution of the "mere denial" of genocide was contrary to freedom of expression, the prosecution of its justification was admissible, since the justification of a crime can be interpreted as an indirect incitement to its perpetration, to violence against the group targeted by that crime and contempt for victims. *Tribunal Constitucional de España*, Judgment No. 235/2007, *Fundamentos Jurídicos* 7 and 9. Similarly in France the *Cour de Cassation* has narrowed down the scope of the Gayssot Act on the criminalization of negationism introducing a bad-faith requirement; it has considered that the denial is punishable "*lorsqu'elle est faite de mauvaise foi*". *Cour de cassation, Chambre Criminelle*, Judgment N° 94-85126, 17 June 1997.

3.2 International Legal Framework

The memory of the Holocaust and Colonialisms played a significant role in shaping the human rights discourse in the post-war era.⁶⁷² Those narratives have had a powerful influence on the cultural heritage of the international community, giving present generations the moral burden to protect them so that they may stand as a warning for future generations against the repetition of similar atrocities. On these ground, in spite of the pivotal role that the human rights system assigns to freedom of expression in the protection of human rights and democracy, the international community has felt at odds with according protection to forms of expressions that amounted to denial or mystification of its historical heritage. These expressions have been equated to behaviour aimed at inspiring, stimulating, or encouraging the acts of racist and xenophobic groups, insulting the memory of victims, and threatening the dignity of the whole community⁶⁷³ As such, international bodies have been keen to express their reproach for these expressions, and to encourage states to clearly distance themselves from them. Nevertheless, no explicit prohibition of historical negationism is included in the general human rights instruments. In the absence of specific provisions, the rejection of revisionist theses, while remaining mostly in the domestic sphere of state sovereignty, has first sought an alternative legal stance in the fundamental rights framework *via* legal interpretation of positive law.

The discriminatory nature of similar forms of speech – either explicitly or implicitly – suggests equality as the first legal ground to combat revisionisms. The anti-discrimination discourse provides, I dare to say, the outer limit to freedom of expression. The regulation of hate speech therefore offers a reference frame to condemn negationist theories as unlawful forms of expressions under international law.⁶⁷⁴ The recognition of the legitimacy of

⁶⁷² Belavusau, U. “Freedom of expression: European and American constitutional models for Central and Eastern Europe” (Ph.D. Thesis, European University Institute, 2011), 193.

⁶⁷³ CoE, *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, 28 January 2003, available at: <http://www.refworld.org/docid/47fdfb20f.html>. Explanatory Report to Art. 6.

⁶⁷⁴ Boyle defines hate speech as “a problematic category of speech and related freedoms, such as freedom of association and assembly, that involves the advocacy of hatred and discrimination against groups on basis of their race, colour, ethnicity, religious beliefs, sexual orientation, or other status.” Boyle, “Hate Speech”, at 489. For a critique on the equivalence between hate speech and historical denial see, *inter alia*, Belavusau, *Freedom of Speech*, 171-174 and, more recently, by the same author, “Historical revisionism in comparative perspective: law, politics and surrogate mourning” EUI Working Papers Series. (Florence: European University Institute, 2013).

restrictions to hate speech indeed indicates what Belavusau defines as “the egalitarian path for freedom of expression”.⁶⁷⁵

On the basis of the anti-discrimination doctrine, international law expressly condemns hate speech as utterances that promote, instigate, or manifest racially motivated opinions and expressions, and encourages states to ban these forms of expressions through legal and political measures.⁶⁷⁶ The state obligation to outlaw hatred manifestations can be inferred from the texts of the main human rights instruments.⁶⁷⁷ The ICCPR and the ACHR explicitly require states to prohibit any promotion or praise of “national, racial or religious hatred that constitutes an incentive to discrimination, hostility or violence”.⁶⁷⁸ Other instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination, go as far as requiring the criminalization of hate speech in domestic law systems.⁶⁷⁹ In this conceptualization, history is protected from malicious manipulations and falsity on the basis of the argument that historical denial of past crimes associates with discriminatory and racist behaviours. As such, negationisms are expunged from the legal protection of FoE on the basis of anti-discrimination laws. As we will see later in this section, this is the main argument that has been used by international human rights bodies to deal with the issue of revisionism,⁶⁸⁰

⁶⁷⁵ Belavusau, *Freedom of Speech*, 182.

⁶⁷⁶ For an comprehensive analysis of the theoretical and historical framework of hate speech regulation under International Law see Farrior, S., “Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech”. *Berkeley Journal of International Law* 14, No. 1 (1996): 1-98.

⁶⁷⁷ UDHR, Art. 2.

⁶⁷⁸ ICCPR, Art. 20. ACHR, Art. 13 (4). The *travaux préparatoires* of the ICCPR reveals that Art. 20 was drafted in response “to the Nazi racial hatred campaigns, which ultimately led to the murder of millions of human beings on the basis of racial, religious and national criteria”. Nowak, M. *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed., (Kehl, Germany: N.P. Engel, 2005). Art. 20, at 475.

⁶⁷⁹ CERD, Art. 4, which requires that states parties “[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities”. On the general International Law framework of hate speech, see Mendel, T., “Does International Law Provide for Consistent Rules on Hate Speech?” In *The Content and Contest of Hate Speech*, eds. Herz, M., Molnar, P., 417 – 429. Mendel argues that, even though a coherent framework to regulate a state obligation to prohibit hate speech exists, and can be argued from the ICCPR norms, international bodies have not yet developed coherent criteria for its development.

⁶⁸⁰ See, for instance, ECtHR, *Perinçek v. Switzerland*: “[L]a negation de l’Holocauste est aujourd’hui le moteur principal de l’antisémitisme”, para. 119. Similarly, the CERD Committee found that the deference to Nazism and to Nazi principles and leaders must be considered “incitement at least to racial discrimination, if not to violence”. *The Jewish Community v. Norway*, Comm. No. 30/2003, 15 August 2005. UN. Doc. CERD/C/67/D/30/2003, para. 10.4.

and this is also, as a matter of fact, how western legal doctrine has first approached this issue from the legal point of view.

Beyond the indirect proscription of negationisms *via* the anti-discrimination discourse, more recently, the denial of historical crimes has been progressively analysed as an autonomous subject. The XXIth century has sadly witnessed the proliferation of forms of negationisms and reproachable public mystifications of historical atrocities.⁶⁸¹ Whereas at the domestic level – as we have seen above –, this has stimulated governments to enact memory laws to preserve ‘historical truths’ in the attempt to put an end to the painful insult to the memories of a traumatic past, at the international level the resurgence of negationisms has urged international bodies to adopt declarations that explicitly condemn the denial of serious crimes in history.

Despite all this, it is hard to argue for the existence of a legal obligation to repress negationisms as such under international law. Yet, the body of international instruments specifically targeting such a reproachable practice is growing, especially in the European scenario. The UN General Assembly has promoted this trend by consistently reaffirming the importance of protecting the memory of past atrocity, and to combat historical revisionisms.⁶⁸² In 2007, the General Assembly eventually adopted resolution 61/255, which expressly condemns “without any reservation any denial of the Holocaust”, and explicitly urges states to reject *unreservedly* any form of historical denial of the Holocaust and any activities to that end.⁶⁸³ Judge Cançado Trindade highlighted the relevance of this resolution for the protection of the duty of remembrance, and the fight against historical revisionism.

The 28th special session of the General Assembly of the United Nations was effectively garnished with significance and symbolism, at a time when direct witnesses (the survivors) of these atrocities are growing old and will not be around much longer. Hence the justified importance ascribed to the cultivation

⁶⁸¹ EU Network of Independent Experts on Fundamental Rights, *Combating Racism and Xenophobia*. Op. n. 5-2005, 28 November 2005, available at: <http://ec.europa.eu/justice/fundamental-rights>.

⁶⁸² See, for instance, UN GA, *Resolution on the Commemoration of the sixtieth anniversary of the end of the Second World War*, 5 May 2005, UN. Doc. A/RES/59/26, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/26&Lang=E.

⁶⁸³ UN GA, *Resolution on Holocaust Denial*, 26 January 2007. UN. Doc. A/RES/61/255, available at: <http://www.un.org/en/holocaustremembrance/docs/res61.shtml>.

of memory in the face of the threat posed by historical revisionism, in complete disregard of the immeasurable human suffering of those victimized [sic].⁶⁸⁴

The Council of Europe, moreover, has been at the forefront in guiding national policies on this very sensitive matter. Under its auspices, within the framework of the fight against racism and xenophobia, the only general international instrument that provides for a state obligation to punish forms of denials of international crimes was adopted: the Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.⁶⁸⁵ By this treaty, states commit themselves to undertake measures to punish as criminal offences the act of

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.⁶⁸⁶

Although Article 6 prescribes a mere content-based restriction to denialist views, the Protocol allows states to introduce an additional requirement for the punishment of the revisionist conduct. They may prescribe that the denial is punished only when the author acts with *dolus specialis*, i.e. with “the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise”. Alternatively, governments may make reservations to the whole or parts of this provision. Not surprisingly, many countries – including the U.S. and a number of EU Member States – have refused to sign the Additional Protocol, or make use of the reservation clause to Article 6 by invoking the protection of FoE.⁶⁸⁷

⁶⁸⁴ IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Merits, Reparations and Costs. Judgment of September 12, 2005 Series C No. 132, Separate Opinion of Judge A. A. Cançado Trindade, “El Deber de Memoria y Su Necesidad”.

⁶⁸⁵ CoE, *Additional Protocol to the Convention on cybercrime*.

⁶⁸⁶ *Ibid.*, Art. 6.

⁶⁸⁷ As of 25 November 2014, the Additional Protocol was ratified by 22 states, 8 of them made reservations to Art. 6 (namely: Denmark, Finland, France, Lithuania, Montenegro, The Netherlands, Norway, and Ukraine). Cfr. the list of reservations made with respect to treaty No. 189 to the *Additional Protocol to the Convention on Cybercrime*, concerning the criminalization of acts of a racist and xenophobic nature committed

Moreover, at the EU level, several political documents were adopted to condemn revisionist theories of genocides and other international crimes in the framework of the fight against racisms and discrimination. Indeed, the Holocaust narrative has provided the basis for the construction of a shared European memory as a stepping stone in the process of integration toward a common European identity. The Stockholm Programme, which set the European agenda of priorities and objectives for the period 2010-2014, made the repudiation of genocides, war crimes, and crimes against humanity committed by totalitarian regimes the common ground of the European identity. While paying due respect to the sovereignty of each Member States in approaching their own history, the Programme urges that “the memory of those crimes (...) be a collective memory, shared and promoted, where possible,” by all the European Members.⁶⁸⁸ Hence, also within this context, the anti-discrimination discourse has provided the conceptual background for developing the EU hate speech policy, on the basis of which the condemnation of negationisms has been mainly justified.

Within this framework, the European institutions have developed a clear policy that pushes for the prohibition of historical negationisms, and that will most likely influence the memory policies of Member States.⁶⁸⁹ In 2001, the Commission initiated the proposal for reviewing the common policy on the fight against racisms and xenophobia,⁶⁹⁰ which eventually culminated, seven years later, in the adoption of the Council Framework Decision 2008/913/JHA (hereinafter FD 2008/913/JHA or just FD).⁶⁹¹ The Decision expressly requires Member States to enact criminal legislation to punish the defence, revisionism, and denial of the core international crimes. Although it originally aimed at harmonizing the legislation of Member States with the treatment of Holocaust denial, as a result of the political pressures from Eastern European Countries, the scope of the Decision was eventually extended to

through computer systems, available at <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=189&CM=&DF=&CL=ENG&VL=1>.

⁶⁸⁸ The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ C 115, 4 May 2010, p. 1–38.

⁶⁸⁹ Indeed, it is already influencing the adoption of anti-denial legislation in Member States. See the Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014) 27 final, 27 January 2014, paras. 3.1.3 and 3.1.4.

⁶⁹⁰ EUComm., Proposal for a Council Decision on combating racism and xenophobia. COM(2001)664, 28 November 2001, which aimed at replacing the 1996 Joint Action 185/5.

⁶⁹¹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. O.J. L 328/55. For a detailed assessment of the Council FD 2008/913/JHA, see Pech, “The Law of Holocaust Denial in Europe”, 39-51.

include forms of revisionisms that also target other serious human rights violations, the criminalization of which is therefore required in an obligation for Member States.

Article 1 of the FD obliges member states to undertake measures to punish the following intentional conducts:

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.⁶⁹²

The anti-discrimination rationale clearly underpins this provision. Similar to the CoE Additional Protocol, the broad scope of the FD is mitigated by the significant margin of appreciation that the Decision grants to Member States. Firstly, by failing to provide a specific definition of the elements of the proscribed conducts, the Decision *de facto* leaves the task of concretely determining the contours of the utterances to be criminalized up to domestic authorities. Secondly, by requiring that the discriminatory conduct is potentially able to create harm (“carried out in a manner likely to incite to violence or hatred”), member states can decide to repress only that behaviour that constitutes a threat to public order or to the honour and reputation of other individuals’ rights.⁶⁹³ Lastly, the FD offers member states the option to subordinate the concrete punishment of a certain conduct to the previous qualification of those events as an international crime by a final decision of a national or international court.⁶⁹⁴ This option in fact offers states the possibility to establish political ranking of legitimacy among historical narratives of mass crimes – hierarchies of truths –⁶⁹⁵, subordinating the protection to

⁶⁹² Council FD 2008/913/JHA, Art. 1.

⁶⁹³ Ibid., para. 2.

⁶⁹⁴ Ibid., para. 4.

⁶⁹⁵ See *supra*, fn. 266.

courts' decisions. As a result of the wide margin of appreciation left to Member States in limiting the scope of the provision, the broad obligation to criminalize negationisms *tout court*, as originally framed in Article 1 of the Decision, is certainly mitigated. It is however certain – and of the outmost relevance - that EU Member States have today a treaty obligation to punish historical denial.⁶⁹⁶

3.3 Case Law on Negationisms

3.3.1 Human Rights Committee

International legal documents are mostly silent on how states should treat negationist theories. With the exception of the two documents mentioned in the previous paragraph – the CoE Additional Protocol to the Cybercrime Convention and Council Framework Decision 2008/913/JHA -, the supra-governmental instruments that tackle this issue are mainly political documents lacking binding force. Nevertheless, in specific cases of historical revisionisms, human rights bodies have been called to the challenging task of striking a fair balance between ensuring fundamental freedoms and rights on the one side, and protecting the memory of events related to past atrocities from oblivion and falsification, on the other.

In section I of this Chapter I have already discussed the reluctance of the Human Rights Committee to legitimize the crystallization of state-imposed interpretations of past events through legislative measures that aim at restricting historical debate.⁶⁹⁷ However, in the only case in which the Committee was called to adjudicate on a case of Holocaust denial, it ruled in favour of the protection of the narrative about the extermination of Jews during WWII against malicious fabrications in private speech.⁶⁹⁸

The decision is well-known. In *Faurisson*, the Committee was called to adjudicate on the conviction of a French citizen by national courts on the legal basis of the first, and most famous of the French memory laws, the Gayssot Act.⁶⁹⁹ Section 24bis of the Law prescribes:

Seront punis des peines prévues par le sixième alinéa de l'article 24 ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou

⁶⁹⁶ See Pech, “The Law of Holocaust Denial in Europe”, 43 – 44.

⁶⁹⁷ *Supra*, para 2.3.1.

⁶⁹⁸ HRC, *Robert Faurisson v. France*, Comm. No. 550/1993, 8 November 1996, UN. Doc. CCPR/C/58/D/550/1993(1996).

⁶⁹⁹ Actually, the Law prohibits *la contestation* of the Holocaust, therefore expanding the scope of the prohibition to cover broader Holocaust revisionists' theories.

plusieurs crimes contre l'humanité tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale.⁷⁰⁰

Monsieur Faurisson, the applicant, was an academic who had publicly questioned the reality and modalities of the Jews extermination. The *Tribunal de Grande Instance de Paris* found that his statements violated the prohibition of Holocaust denial established by the Gayssot Act, and therefore convicted the applicant for "*contestation de crimes contre l'humanité*". Monsieur Faurisson lodged a complaint at the Human Rights Committee, in which he contested the Gayssot Act, arguing that it constituted "unacceptable censorship, obstructing and penalizing [of] historical research", and claimed that the conviction violated his right to freedom of expression, *ex* Article 19 of the Covenant.

The Committee, whilst expressing reservations about the legitimacy of the content-based restrictions imposed by the Gayssot Act *in abstracto*, *in concreto* ruled against the applicant, finding that the conviction was legitimate in view of the three-tier test imposed by Article 19(3). The Committee constructed its decision on the basis of the anti-discrimination doctrine. The argument was driven by the consideration that Holocaust denial is a vehicle for anti-Semitism which states must oppose through the adoption of appropriate measures. Since this kind of speech – such as the applicant's statements –, can encourage or foster anti-Semitic feelings, its restriction is both legitimate – in that it preserves the Jews' right "to live free from fear of an atmosphere of anti-Semitism" –, and necessary in a democratic society – in that it aids in the struggle against racism and discrimination. To admit restrictions to expressions that deny the Holocaust, the Committee therefore requires that the utterance is potentially capable of strengthening racist inclinations and discrimination.⁷⁰¹

Indeed, at a broader level, the case offered the Committee the opportunity to express – *de jure condito* - an assessment of the compatibility of memory laws in general with the

⁷⁰⁰ Art. 24bis, introduced by Art. 9, Law 90-615 /1990, cit.

⁷⁰¹ This position was further confirmed by the Committee in *Malcolm Ross v. Canada*, Comm. No. 736/1997, 21 August 2000. UN. Doc. CCPR/C/70/D/736/1997 (2000).

principles and rights of the Covenant. However, the Committee did not fully exploit this opportunity, and limited itself to warning that

[t]he application of the terms of the Gayssot Act, which, in their effect, make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant.

By means of this statement, the Committee implicitly suggests that the criminalization of expressions that challenge historical facts, even when ascertained as judicial truths by international courts, are hardly reconcilable with the principles of the Covenant. It further restates that every restriction, including those imposed on negationist speech, should meet the conditions set out in Article 19, paragraph 3. However, when it comes to concretely scrutinizing those restrictions, the way the Committee applies the Article 19(3) test to the Gayssot Act seems to imply that Holocaust denial automatically justifies the necessity of a restriction. Indeed, the Committee fails to examine in detail the connection between negationism and anti-Semitism or incitement to hatred, as well as the necessity of banning negationist theories to fight against racism and anti-Semitism, thereby implicitly espousing the argument that – at least with regard to the Holocaust – every form of negationism is hate speech.

The separate opinions to that decision challenged the state’s freedom to impose general restrictions to the historical debate more, and reinforced the position that memory laws are generally incompatible with the FoE regime expressed by Article 19. Four members of the Committee, in particular, stressed the duty of states to protect “*bona fide* historical research against restriction, even when it challenges accepted historical truths”, and incidentally suggested that legislative measures that try “to turn historical truths and experiences into legislative dogma that may not be challenged” would hardly meet the validity test to allow restriction to freedom of expression.⁷⁰² Whilst the subsequent developments in the HRC practice that we discussed above have favoured a restrictive approach to memory laws,⁷⁰³ this decision in a way confirms the tendency that we have already found at the national level to

⁷⁰² HRC, *Faurisson v. France*, Concurring individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, paras. 8-10; Concurring individual opinion by Cecilia Medina Quiroga, para 2; Concurring individual opinion by Rajsoomer Lallah, paras. 6-7.

⁷⁰³ *Supra*, para 2.3.1.

consider Holocaust denial cases as cases of hate speech *tout court*, in which revisionist theories cannot seek protection under FoE provisions.

3.3.2 European Court of Human Rights' case law

Besides the indications provided by the HRC in Faurisson, the European Court and Commission's case law enriches the jurisprudence on negationism. As we have seen in the previous section, the Court has been keen to protect freedom as the guiding principle of historical research and historical debate.⁷⁰⁴ The Court has constantly restated that it is not its role to adjudicate on historical debates, and has consistently valued the open discussion on the past as an essential condition of democracy, especially for those countries riven by a 'dark past'. Nevertheless, the especially heavy heritage of the Holocaust that weighs on the shoulders of European countries has caused the Court – and before it the Commission – to face the idea that certain historical narratives need to be protected against falsifications and manipulations. Since the beginning, therefore, the European human rights bodies have been concerned with condemning negationist theories, in particular with regard to those related to Holocaust denial. In fact, the European Commission of Human Rights already condemned revisionist or negationist theories of the Holocaust as contrary to the fundamental principles and values of the European Convention, and warned against the negationists' attempts to shield their hatred views with the protection of freedom of expression.

However, the legal reasoning used by the European adjudicatory bodies has not always been coherent, and two different legal avenues can be identified in the jurisprudence of the Council of Europe's bodies in regulating issues of historical negationisms.⁷⁰⁵ On the one hand, using a 'softer' approach, restrictions to expressions that aimed at denying or manipulating historical facts are scrutinized under Article 10 of the Convention. On the other hand, showing a more radical stance, these expressions are removed *tout court* from the protection of Article 10 under certain conditions, through the application of Article 17.

⁷⁰⁴ *Supra*, para 2.3.2.

⁷⁰⁵ For an overview of the Commission and Court's case law, see Pech, "The Law of Holocaust Denial in Europe", 30-32; and the recent work of Lobba, P., "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", *European Journal of International Law* (forthcoming).

The former approach was first adopted and followed by the Commission, which between 1982 and 1996 decided a number of cases concerning Holocaust denial.⁷⁰⁶ Applying Article 10 to decide these cases, the Commission, consistently considered restrictions imposed by national authorities to expressions aimed at denying or questioning the existence or the circumstances of the Holocaust interferences with the individuals' freedom of expression. However, applying the three-tier test, it constantly judged these interferences lawful, as responding to some legitimate social interests, which proved "necessary in a democratic society".⁷⁰⁷ In these cases, Article 17 was used by the Commission as an interpretative instrument to the limits to FoE.⁷⁰⁸

The latter avenue was developed more recently by the Court, as a result of the increasing number of Holocaust denial cases that it was called to adjudicate. In this radical jurisprudential turn,⁷⁰⁹ the Court suggests that Holocaust denial, running counter to the fundamental values of the Convention, constitutes an abuse of rights, and as such it cannot rely on any protection within the European system of human rights protection. Therefore, it applies Article 17 to dismiss as manifestly ill-founded all claims against restrictions imposed to these expressions by national authorities.

Article 17 introduces an inner safeguard into the Convention by prohibiting the abuse of rights.

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Oetheimer explains Article 17 by saying that it aims at "withdrawing from those who wish to use the Convention's guarantees the benefit of those rights because their aim is to

⁷⁰⁶ The first case on Holocaust denial discussed before the ECommHR was *X. v. Federal Republic of Germany*. App. No. 9235/81. Decision of 16 July 1982. For further references, see *infra*, fn. 705.

⁷⁰⁷ ECommHR, *Kühnen v. Germany*. App. No. 12194/86, Decision of 12 May 1988; *Walendi v. Germany*, App. No. 21128/92, Decision of 7 January 1993; *Ochsenberger v. Austria*, App. No. 21318/93, Decision of 2 September 1994; *Honsik v. Austria*. App. No. 25062/94, Decision of 18 October 1995; *Marais v. France*. App. No. 31159/96, Decision of 24 June 1996.

⁷⁰⁸ This is what Cannie and Voorhoof describe as the "indirect application of Article 17". Cannie, H. and Voorhoof, D., "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" *Netherlands Quarterly of Human Rights* 29, No.1 (2011): 54 – 83.

⁷⁰⁹ See Pech, who talks about the "radical approach" to Holocaust denial as an abuse of rights. Pech, "The Law of Holocaust Denial in Europe", at 34.

challenge the values that the Convention is protecting”.⁷¹⁰ Notably, the *travaux préparatoires* reveal that the main motivation behind this provision was the objective to prevent totalitarianisms from using the Convention to shield their actions.⁷¹¹ Introducing this provision to an audience of judicial trainers of human rights in Strasbourg, Françoise Tulkens, former judge and vice-president of the ECtHR, recalls Saint-Just words, “No freedom for the enemies of freedom”, and quotes J. Rawls in that “justice does not require that men must stand idly by while others destroy the basis of their existence”.⁷¹² Article 17 is therefore the ultimate safeguard for the values protected by the European Convention of Human Rights.

The two approaches to the phenomenon of negationism are dramatically different. Indeed, the application of Article 10 obliges the judge to make an evaluation of content, context, and aims of the restricted expressions in order to assess the legitimacy of the interference. In this way, negationist theories are assessed on the basis of the effective harm they may cause to public order and individuals’ rights, also in consideration of the means through which they are uttered and disseminated, and of their impact on the society. This approach therefore imposes a case by case method, which requires a careful evaluation of, and a balancing exercise between, the different interests at stake in the specific situation. Conversely, when Article 17 is directly applied in relation to Article 10, it categorically excludes the possibility of accommodating certain expressions under the protective scope of freedom of expression (guillotine effect).⁷¹³ As a consequence, neither evaluation of the context nor balancing of values is to be carried by the judge, thusly, restrictions to these expressions are always admissible.

⁷¹⁰ Oetheimer, M., “La Cour européenne des droits de l’homme face au discours de haine”, quoted in Tulkens, F., “When to say is to do. Freedom of expression and hate speech in the case-law of the European Court of Human Rights”. Expert Seminar on Human Rights for European Judicial Trainers. 3 September 2013, 3.

⁷¹¹ *Travaux préparatoires* on art 17 ECHR (DH (57)4) (1949, 18t session, pp. 1235, 1237, and 1239): “Il s’agit d’empêcher que les courants totalitaires puissent exploiter en leur faveur les principes posés par la Convention, c’est-à-dire invoquer les droits de liberté pour supprimer les Droits de l’Homme.” In *Yearbook of the European Convention on Human Rights, European Commission of Human Rights, Documents and Decisions (1955-1956-1957)*, (Martinus Nijhoff Publishers: 1959), at 224. On the origin and rationale of the abuse clause, see Cannie, H. and Voorhoof, D. “The Abuse Clause and Freedom of Expression in the European Human Rights Convention”.

⁷¹² Tulkens, “When to say is to do”, 3.

⁷¹³ See Cannie, H. and Voorhoof, D. “The Abuse Clause and Freedom of Expression in the European Human Rights Convention”, 58.

In the context of Holocaust denial, the Court first developed this latter approach in *Lehideux and Isorni v. France*.⁷¹⁴ The case concerned the conviction of two French citizens who had placed an advertisement in the newspaper *Le Monde*, in which they presented Philippe Pétain (Chief of State of Vichy between 1940 and 1944, who had been sentenced to death and convicted “for collusion with Germany with a view to furthering the designs of the enemy”) as a positive public figure in French history, seeking to rehabilitate his image. The applicants were convicted by the Paris Court of Appeal for “public defence of war crimes or the crimes of collaboration”. Before the Court, the Government justified the conviction arguing that the publication did not contribute to a public debate of a historical nature, and contesting the lack of objectivity and seriousness of the historical research reported in the script. The Court did not respond to the issue about the quality and the requirements of the authentic historical research, but it introduced the category of “clearly established historical facts – such as the Holocaust” in the reasoning, maintaining that every denial or revision thereof is removed from the protection of Article 10 by Article 17.⁷¹⁵ Through this *obiter dictum*, the Court audaciously refuses Holocaust deniers the employment of the protection of freedom of expression in order to shield their theories. However, in *Lehideux*, the Court excluded the facts of the case from that category, since it found that the applicants’ publication had not attempted to deny or revise Nazi crimes. Consequently, it assessed the imposed sanctions through the ordinary test of legitimacy, lawfulness and necessity prescribed by Article 10(2).

It was in *Garaudy* that the Court first applied the Article 17 guillotine to declare inadmissible the complaint lodged by a French citizen, who, by virtue of the above mentioned Gayssot Act,⁷¹⁶ had been convicted of denying crimes against humanity in his book, *The Founding Myths of Israeli Politics*. In the book, the author challenged a number of historical findings related to WWII, in particular questioning the occurrence, extent, and gravity of the persecution of Jews, and the “final solution” carried out by the Nazi regime, on different points. Quite drastically, the Court refused to qualify the applicant’s work as ‘historical

⁷¹⁴ ECtHR, *Lehideux and Isorni v. France*. Indeed, the Commission had applied Art. 17 to cases of Holocaust denial even before *Lehideux*. In those cases, however, Art. 17 was used as an interpretative instrument to guide the scrutiny imposed by Art. 10.2, and the corresponding cases had been eventually assessed on the legal basis of the latter. See *supra*, fn. 705.

⁷¹⁵ ECtHR, *Lehideux and Isorni v. France*, para. 47.

⁷¹⁶ Law 90-615/1990, cit.

research’, and found that he could not invoke the protection of Article 10 to deny the reality of clearly established historical facts, such as the Holocaust.⁷¹⁷ Such a denial, in view of the Court, is evidently not motivated by a genuine quest for truth. On account of its real purpose being “to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history”, it falls outside the scope of historical research - which is instead protected by freedom of expression. On these grounds, the Court observes that such a form of denial is a type – one of the most alarming ones – of racism and racial defamation. As such, this kind of utterance is incompatible with the Convention’s core values and principles.

[I]l ne fait aucun doute que contester la réalité de faits historiques clairement établis, tels que l'Holocauste, comme le fait le requérant dans son ouvrage, ne relève en aucune manière d'un travail de recherche historique s'apparentant à une quête de la vérité. L'objectif et l'aboutissement d'une telle démarche sont totalement différents, car il s'agit en fait de réhabiliter le régime national-socialiste, et, par voie de conséquence, d'accuser de falsification de l'histoire les victimes elles-mêmes. Ainsi, la contestation de crimes contre l'humanité apparaît comme l'une des formes les plus aiguës de diffamation raciale envers les Juifs et d'incitation à la haine à leur égard. La négation ou la révision de faits historiques de ce type remettent en cause les valeurs qui fondent la lutte contre le racisme et l'antisémitisme et sont de nature à troubler gravement l'ordre public. Portant atteinte aux droits d'autrui, de tels actes sont incompatibles avec la démocratie et les droits de l'homme et leurs auteurs visent incontestablement des objectifs du type de ceux prohibés par l'article 17 de la Convention.

This is to say, in other words, that freedom of expression does not cover the freedom to express revisionist theories that question or misrepresent historical events which are generally regarded as clearly established by the international academic community.⁷¹⁸ The anti-discrimination doctrine and the victims’ right to honour and reputation provide the grounds for this exclusion.

⁷¹⁷ *Garaudy v. France*, para. 1(i)

⁷¹⁸ This argument was confirmed and further expanded by the Court in *Witzsch v. Germany*, as to encompass not only the pure denial of the Holocaust *tout court* (i.e. its existence), but also other “equally significant and established circumstance[s]”. ECtHR, *Witzsch v. Germany*. App. No. 7485/03. Judgment of 13 December 2005, para. 3. However, it has to be noted that while the Court assesses the existence of the malicious intent of the author (“the real purpose”) as a decisive argument to apply Art. 17 in *Garaudy*, in *Witzsch* there is no trace of inquiry into the psychological construction of denial.

This radical approach to revisionist speech can be criticized on a number of points.⁷¹⁹ First of all, it is questionable whether it is in line with the general approach of the Court which tends to interpret the scope of rights and freedom broadly, usually encouraging a case by case balancing exercise between competing rights. As has been noted, the exclusion of certain narratives from the freedom of speech protection allows governments a lot of room to manoeuvre in imposing content-based restrictions to forms of expressions,⁷²⁰ thereby fuelling the fear of legitimizing censorship. Secondly, and touching more on the core of the regulation of the historical debate, it is hard to reconcile this approach with the principles of freedom in the historical research that we discussed in the first part of this Chapter, and which the Court has consistently confirmed in parallel to the ‘clearly-established-facts-doctrine’ in cases other than Holocaust denial.⁷²¹ Finally, the category of the so-called ‘clearly established historical facts’ proves problematic in that it does not offer any criteria to distinguish among different historical debates. It does not clarify which narratives can be considered uncontroversially established in history and should be protected against denial and revisionisms *ipso jure* (through the application of the abuse clause), and which ones are instead still subject to the ongoing debate typical of historical research that is protected from illegitimate interferences by Article 10. What are, in other words, the criteria to consider an historical event “clearly established”? Who is to establish when an historical debate has led to the establishment of an historical truth? The Court’s case law provides little clarification. It limits itself to reiterating that the Holocaust is *an* example of clearly established historical facts, the denial of which would justify the application of Article 17.⁷²² While, on the one hand, this allows one to argue that there are other historical facts that can be included within this category, on the other hand, the Court failed to mention any.⁷²³ The ultimate result of this approach is that the Court

⁷¹⁹ See, *inter alia*, Pech, “The Law of Holocaust Denial in Europe”; Kučs, A., “Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies”, *Journal of Ethnic and Migration Studies* 40, No. 2 (2014): 301-319; Lobba, “Holocaust Denial before the European Court of Human Rights”.

⁷²⁰ Pech, “The Law of Holocaust Denial in Europe”, 38.

⁷²¹ See *Supra*, para. 2.3.2.1.

⁷²² ECtHR, *Janowiec and Others v. Russia*, in which the Court declares that its “constant position” has been that of considering the denial of *any* crime against humanity, such as the Holocaust, as running “counter to the fundamental values of the Convention”, para. 165.

⁷²³ The only exception is the recognition of the Katyn massacre as “established historical facts”, whose denial “was not just opprobrious but also lacking in humanity”. ECtHR [GC], *Janowiec v. Russia*, paras. 186 and 165. Yet, even in that case, the Grand Chamber did not attach the adequate relevance to that finding to find a violation of the Convention. In other cases, although the Court has abstractly figured out other hypotheses in

applies the ‘*guillotine clause*’ only to Holocaust deniers, thereby *de facto* creating double standards for different categories of historical injustices.

Indeed, in cases related to denials of historical events other than the Holocaust, the Court refused to apply Article 17, and instead scrutinized the restrictions imposed to the negationist expressions through the lens of Article 10. This was the case in *Perinçek v. Switzerland*, which I discussed above as a point in case for freedom of historical research.⁷²⁴ As the reader will remember, that was a case involving a conviction for denial of the Armenian genocide (*rectius*: denial of the *legal qualification* of the Armenian massacre as genocide), in which the Court found a violation of the applicant’s freedom of expression on the basis of Article 10. The Court neatly distanced this case from the previous decisions on Holocaust denial, and carried out a concrete evaluation of the kind of utterance under scrutiny, and its potential harmful nature. The Court stressed the following differences with Holocaust denial cases in particular. Firstly, the facts of this case were not in respect of the denial of historical events, but rather the denial of their legal qualification; secondly, Nazi crimes had been judged on a specific legal basis, i.e. Article 6 of the Nuremberg Tribunal Statute (unlike, implicitly, the crimes committed against Armenian people); finally, Nazi crimes had been clearly established by an international court.⁷²⁵ In addition, as mentioned above, the Court found that Holocaust denial cases further diverged from expressions that deny the qualification of the Armenian massacre as genocide in their aim, since the former intrinsically convey and promote anti-Semitic messages, which can be regarded as a form of incitement to hatred and violence, whilst the latter do not.⁷²⁶

With this reasoning, the Court does two things. On the one hand, it seems to refer to legal instruments (either legal texts, such as the Nuremberg Tribunal Statute, or judicial organs, such as an international court) to establish when a historical debate can be considered

which a denial or justification of international crimes may legitimize the application of Art. 17, *de facto* it has always found that the circumstances of each specific case did not justify that line of reasoning. In those cases, it therefore ended up assessing the cases on the basis of Art. 10. See *Orban et. al v. France*, para. 35; *Fatullayev v. Azerbaijan*, para. 81; *Fáber v. Hungary*. App. No. 40721/08. Judgment of 24 July 2012, para. 58.

⁷²⁴ *Supra*, para. 2.3.2.2.

⁷²⁵ In this way, hence, the Court seems to suggest that the question of the Armenian genocide is still an ongoing debate, subject to historical debate. *Perinçek v. Switzerland*, para. 117.

⁷²⁶ *Ibid.*, para. 118.

closed, and, therefore, when a historical facts can be considered ‘clearly established’. On the other hand, from hate speech law, it borrows the teleological purpose of incitement to hatred and violence and the intrinsic potentiality of the conduct to cause harm to restrict the application of Article 17 in cases of denial of serious crimes, other than the Holocaust. Whilst the first argument seems worrisome, especially in the light of the protection of the independence of historians and historical research,⁷²⁷ and the boundaries between historical and judicial truths, the second argument, as noted above, seems to narrow down the cases in which historical debate – even in the case of negationist theories - can be restricted.⁷²⁸ It seems to say, in other words, that the ultimate rationale to allow states to restrict historical debate is the repression of hate speech.

While the jurisprudential approach in *Perinçek* seems to be welcomed for its casuistic approach when assessing restrictions to the free discussion of history, it has still to be verified whether this latest development in the Court’s case law on negationism will also apply to Holocaust denial cases, or whether the Court will decide to keep the exceptional approach it has adopted so far for those cases.

3.3.2.1 Overcoming double-standards. Different interpretative avenues?

It has been suggested that a different perspective may be taken to reconcile the double-standard approach used by the Court in adjudicating cases of negationsisms. The victims’ right to honour and reputation, in this sense, has been indicated as a possible interpretative avenue to justify restrictions to denial speech in cases of gross human rights violations.⁷²⁹ The reasoning would entail, as mentioned above, that negationisms constitute an offence to victims’ memory, and cause additional suffering to their honour. This argument is certainly an

⁷²⁷ Historians have expressed serious concerns about the process of ‘juridification of history’ that delegate historical facts to courtrooms. In this sense, Nora affirmed: “[I]t is up to the politicians to commemorate, to pay homage and to organise compensation; it is up to them to honour the victims. It is up to the historians to do the rest, to establish the facts and to propose interpretations of these facts, restricted by neither constraint nor taboo.” Nora, P., “History, Memory and the Law in France, 1990–2010”, *Histoirein* 11 (2011): 10 - 13, at 13. For the claim of historians on this point, see the collection of selected works in Cajani, L., Liakos, A., (eds.) *How to deal with tormented pasts*. *Histoirein*, 11 (2011). See also, in the same directions, the initiatives of the French association *Liberté pour l’Histoire*. However, to mitigate the potential threat of this decision of the Court, it has to be considered that the Court put forth this argument with regard to the denial of the legal qualification of a historical fact. It is still to be verified whether the reliance on judicial instances for the definition and qualification of historical facts as definitively established would also apply to the denial or revision of historical events as such.

⁷²⁸ *Supra*, para. 2.3.2.2.

⁷²⁹ Lobba, “Holocaust Denial Before the European Court of Human Rights”, 12 -13.

interesting lens through which the issue of historical denial can be approached. Besides its substantial value in the recognition of victims' rights, this argument would also have the advantage of avoiding resorting to the non-discrimination doctrine to justify restrictions. Thereby, it would bridge the gap in the Court's reasoning between denials *intrinsically* enshrining racist manifestations (i.e. Holocaust denial, excluded from the protection of Article 10 by Article 17) and those whose racist or discriminatory nature has to be ascertained and assessed *in concreto* through the lens of Article 10. This would allow it to use the same line of reasoning with regard to the denial of every case of serious and severe human rights abuses that happened in the past. Furthermore, this would put the protection of human dignity at the centre of the evaluation process for defining the outer limits of individual freedoms.

Indeed, the protection of the victims' right to honour and reputation, which constitutes a legitimate justification for restricting freedom of expression in the main human rights instruments,⁷³⁰ has been taken into account both at the national and supranational level. Besides the practice at the domestic level, the right to honour has been also used as a limiting ground to freedom in the historical debate by the Strasburg Court in a number of decisions.⁷³¹ Nonetheless, in spite of the advantages to this argument, some doubts may be cast on the capability and feasibility of it overcoming the ambiguity as to the different approaches used to outlaw negationisms in the Court's jurisprudence.

First of all, from a theoretical point of view, it does not seem that this approach will bring any reconciliation between – or clarification of – the category of the “well established historical facts” and that of matters on which “historical debate is still going on”, which constitute a major area on which the Court maintains a wide margin of discretion. Second, from a positivist viewpoint, it does not appear that the Court is willing to use this ground as the guiding principle of the balancing exercise it has to apply in cases of discussions of public interest, such as historical debates. While it has always expressed the greatest respect for the victims' right to honour and reputation, in practice, the Court has struck the balance between

⁷³⁰ ECHR, Art. 10(2); ICCPR, Art. 19(3)a; ACHR, Art. 13(2)a. *Supra*, para. 1.3.

⁷³¹ In *Witzsch v. Germany* for instance, a case of Holocaust denial in which the author's negationist utterances were condemned as contrary to the Convention values, the victims' dignity was a point in case to justify the restriction. ECtHR, *Witzsch v. Germany*, para. 3. The same argument has been similarly used by the Court also in cases concerning historical debates on different events of the past. See *Fatullayev v. Azerbaijan*, para. 98; *Faber v. Hungary*, para. 58; *Perinçek v. Switzerland*, para. 111; *Janowiec v. Russia*, para. 165.

the latter and freedom of expression in alternating ways. In cases involving debates on historical events amounting to serious human rights violations (other than the Holocaust), the balance was mostly tipped in favour of the interest of society in discussing its own history,⁷³² also in consideration of the effects of the passage of the time,⁷³³ whereas in Holocaust denial cases, the balance was reversed.⁷³⁴ Admittedly, on more than an occasion, the Court has suggested that the denial or trivialization of serious human rights violations would constitute an inadmissible offence to victims' dignity.⁷³⁵ Yet, in none of the cases - other than the Holocaust denial ones -, the Court has upheld a restriction to historical debate on this ground. The equality argument, for all that it would need to be refined by the Court, therefore seems the preferred avenue of interpretation so far.⁷³⁶ Nonetheless, future developments in the Court's jurisprudence may position victims' suffering better as a threshold for assessing historical debate.

Concluding remarks

This Chapter has discussed the legal framework that international law provides for the discussion on history, mainly on the legal basis of freedom of expression. In particular, the Chapter has raised the questions of whether – and to what extent –, according to the existing human rights framework, states may impose restrictions to the historical debate, and whether, under certain circumstances, they have an obligation to do so. The results of this analysis provide additional elements for sketching the contours of the state duty of memory in that they point out the impact of human rights law, through freedom of expression provisions and their practical implementation, on the public discussion of the past.

From the previous analysis, it can be derived that the fundamental principle governing the historical debate is freedom. Public discussion on past events that constitute the historical heritage of a society is protected both at the individual level – as a form of expression of individual freedom – and at the collective one – as a form of protection of the public interest in

⁷³² *Lehideux and Isorni v. France*, para. 55; *Orban et al. v. France*, para. 52; *Karsai v. Hungary*, paras. 35, 37; *Braun v. Poland*. App. No. 30162/10. Judgment of 4 November 2014, paras. 43; 48-51.

⁷³³ *Lehideux and Isorni v. France*, para. 55; *Orban et al. v. France*, para. 52; *Monnat v. Switzerland*, para. 64; *Perinçek v. Switzerland*, para. 103.

⁷³⁴ *Garaudy v. France*; *Witzsch v. Germany*.

⁷³⁵ *Fatullayev v. Azerbaijan*, para. 98; *Perinçek v. Switzerland*, para. 47; *Janowiec v. Russia*, para. 165.

⁷³⁶ In the same sense, Pech suggests that 'it seems wiser to rely on "standard" provisions dealing with racial insult and defamation to prosecute' denial cases. Pech, "The Law of Holocaust Denial in Europe", 20.

debating matters that are relevant for the democratic life of a society. Moreover, such a discussion is promoted and favoured as a means to foster the democratic transition of countries emerging from authoritarian regimes or systematic violence, and strengthen the values of pluralism, tolerance, and respect in established democracies. Plurality of researches, studies, and theories in investigating the past is considered a contribution to the struggle for historical truth, and is thus protected and promoted. This principle seems further supported by the other legal grounds in the field of cultural rights, which have been suggested in order for future research to delineate the state duties with regard to the historical discussion.

In this sense, it can be affirmed that states do have a duty to respect the free and open discussion on historical matters, especially when such a debate involves the discussion of historical events that are particularly meaningful for the society, such as mass state-sponsored crimes committed in the past. International bodies have rejected the legitimacy of general restrictions – such as the so-called *lois mémorielles* - imposed on historical debates by states. Even erroneous or incorrect opinions that participate in that debate, as well as shocking or disturbing ones, should be protected by freedom of expression. Although restrictions to the application of the general principles of freedom of expressions are admissible, their legitimacy has to be strictly scrutinized. In the case law of the European Court of Human Rights, historical debate is included among matters of public relevance, in which the margin of appreciation left to states is small. Through the restrictive interpretation of the criteria of legality, legitimacy, and – in particular – necessity, the Court has thus ultimately strengthened the protection of freedom of historical debate to the detriment of other competing values.

In apparent contrast to these principles, the Chapter has also analysed the phenomenon of the prohibition of ‘negationisms’, i.e. the practice of banning expressions that aim at denying or questioning the history of international crimes committed in the past. This phenomenon has provided the grounds to examine and assess the second question, namely the existence of a state duty to punish historical denialisms – the duty to protect history. The question is particularly thorny, and involves not only legal issues, but also, and especially, moral and political considerations. Although acknowledging the moral and political hurdles intrinsic to this discussion, the chapter has mainly focused on its legal assessment.

The rationales underlying the prohibition of negationisms are various and diverse, but they mainly revolve around two main arguments: the victims’ right to honour and reputation,

and the anti-discrimination rationale. Negationist speech, in fact, has been deemed an insult to the victims' dignity and honour, and an insult to their memory. At the same time, however, the fight against racism and discrimination has provided the main justification for imposing restrictions on revisionist speech. The underpinning argument to this latter rationale is that these utterances pose a threat to public order and security, since they intrinsically embody some forms of incitement to racially motivated hatred and violence. As such, they must be repressed.

The need to protect these values, also in the light of the historical experiences of each country, has made some states and international bodies adopt instruments for restricting forms of negationisms. The analysis of the state practice has revealed a kaleidoscopic landscape. While not all the states have decided to criminalize historical denial, most of them have either introduced specific norms to outlaw the dissemination of negationist views in the society, or have used hate speech law arguments to restrict their utterance in courts. The European scenario has proven particularly fruitful for analysing the subject. The delicate balancing exercise in assessing historical denials has fuelled a heated debate among national constitutional courts about the admissibility of anti-denial laws. At the supranational level, while the ECtHR has never explicitly taken a position on the legitimacy of memory laws in general, it has taken a radical approach when assessing cases related to Holocaust denial, excluding this kind of expressions from the protection of Article 10 *tout court*. Furthermore, the recent EU FD has significantly imposed on EU Member States the legal obligation to introduce into their national legal systems the criminal repression of historical denial of all international crimes, although allowing for some limitations to the scope of this obligation.

How can these trends be reconciled with the principle of freedom in historical debate and with the state duty to respect it? It seems that the non-discrimination doctrine can assist in this sense. By justifying only the repression of those expressions that concretely constitute an incitement to hatred and violence, which pose a real threat to public order or cause damage to other people's rights, the application of the hate speech regime to the discussion on history entails that mere content-based restrictions to the historical debate should be considered unacceptable and freedom is preserved as the rule governing that debate. In this interpretation, the state duty to protect history against manipulations and falsifications exists only with regard to views that purport malicious intents, or which constitute a form of advocacy for hate and violence. These views, it can be argued, cannot be even considered scientific opinions. Those

who maliciously fabricate historical narratives with racist and hatred intent cannot be admitted within the circle of *bona fide* historians. This view is in line with the approach adopted by both the ECtHR⁷³⁷ and the HRC⁷³⁸ which accords protection only to *bona fide* historical research, depriving malicious revisions of the history of mass atrocity of the banner of history. Although this approach admittedly causes the rise of the problem of identifying what the criteria of the historical research are, and, in particular, the question of whether courts are the appropriate *fora* to discuss them, it seems to reconcile the two trends at the international level. On the one hand, it forces national parliaments to refrain from adopting broad and generalized restrictions to the historical debate, and requires courts to apply an accurate case by case balancing exercise to assess the concrete threat and harm caused by the negationist statements. On the other hand, it expulses racist and discriminatory argumentations from the realm of historical debate, therefore allowing for their repression by states.

While this reconstruction seems consistent with the general trends at the international level, the special regime to which Holocaust denial cases have been submitted should be noted,. On the grounds that Holocaust denial intrinsically entails an anti-Semitism ideology, the concrete assessment of a real harm or threat that the utterance may cause is hardly required for admitting restrictions in these cases. Opinions about the legitimacy of this separate regime diverge. Professor Pech argues that the justification for the different treatment reserved for the memory of the atrocities suffered by Jewish people in WWII is to be found more in moral and historical grounds than in legal arguments. While this explanation is certainly understandable,⁷³⁹ it is doubtful whether human rights systems should still pay this exceptionalism tribute to the legacy of the past. The application of the same criteria of evaluation, while not diminishing the importance and respect which we all are to pay to the

⁷³⁷ *Supra*, para. 3.3.2. See, in particular, ECtHR, *Garaudy v. France*, para. 1(i).

⁷³⁸ *Supra*, para. 3.3.1. See, HRC, *Faurisson v. France*, paras 9.6, 9.7, and, in particular, the individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein, paras. 9-10; In this sense, also CERD: “The Committee recommends that public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial”, *General recommendation No. 35: Combating racist hate speech*. 26 September 2013, UN. Doc. CERD/C/GC/35, para. 14.

⁷³⁹ Pech, “The Law of Holocaust Denial in Europe”, 15. Pech puts forth this argument to explain the German Constitutional Court’s approach. It seems to me, however, that such an argument may well also be extended to the broader historical and moral responsibility of the whole international (or at least western) community.

memory of that past, seems more in line with the principles of equality and non-discrimination. Indeed, the casuistic approach required by the balancing exercise enshrined in the FoE provisions seems to allow enough flexibility, but more equality, to deal with these cases, than resorting to the abuse of rights clauses. Here, however, it is memory that shapes the law.

Conclusions

1. Overview of this Research

This study has examined the role of international law in shaping the memory of past atrocities. It queried whether and to what extent a *duty of memory*, defined as the *set* of states' behaviours that are compelled by international norms and that influence the dynamics of memory-making processes, is emerging in the current regime of international law. The investigation has focused on the interactions between international law and practice and memory processes in the aftermath of gross human rights violations. The hypothesis of the research was that international law imposes certain duties and obligations on states that – directly or indirectly - influence the ways that narratives of mass crimes are told and represented within the affected societies, and ultimately transmitted to future generations.

The aim of the study was to identify the states' behaviours which result from international obligations that impact on the construction and circulation of memories in order to recognize their legal foundations and to outline their scope through the interpretation of international legal instruments and the practice of national and international judicial and quasi-judicial bodies. While holding to a positivist analysis of the existing legal regime of international norms and the observation of the practice, this research has adopted a critical approach to the subject by pointing out the shortcomings of the ways these duties have been framed in the law and interpreted in the practice.

The analysis ultimately led to the creation of a map – a puzzle – of the duty of memory in which the compelled states' behaviours are the constitutive pieces. This study identified five main duties which states bear in the aftermath of mass atrocities that are relevant for the creation and representation of images of past traumas. The duty to ascertain facts that amounted to gross violations of human rights through official investigations; the duty to make the resulting narratives and all the other relevant information publicly available, and to allow them to circulate within the society; the duty to collect historical records of the abuses, and create human rights archives to preserve those documents from the passage of time; the duty to commemorate the occurred violations; and, finally, the duty to respect and promote the plurality of voices in the public debate about the history of those events, while protecting the

memory of ascertained narratives against malicious revisionisms and negationisms. While not being definitive, as more duties can certainly be found and encompassed in the puzzle to enrich it, the duty-to-memory-puzzle presented in this thesis – *in fieri* as a ‘Lego’, which offers the possibility of inserting new building blocks to expand the construction – suggests a framework to construct a legal theory – I dare to venture – of a broader obligation to memory.

Before drawing general conclusions about the nature and relevance of this duty, it is useful to recall the main findings about each of the different components. I will present them along a timeline of memory.

2. The Duty of Memory as a Pendulum: Back and Forth throughout Past, Present, and Future – The Components of the duty of memory

Borrowing Booth’s metaphor, the duty of memory, in the five components analysed in this thesis, works like a pendulum,⁷⁴⁰ which moves back and forth throughout the categories of time: past, present, and future. It can be seen as an organizing category of distinct legal norms that, throughout the temporal dimensions, influence how history is interpreted and the past is represented, and therefore impacts on the ways individual and collective memories are shaped. It is a lens through which we can observe the development of memories of past atrocities within the legal framework. In so doing, the duty of memory takes shape in the form of different legal items, moving from the field of primary rights to secondary norms of responsibility. The five components analysed in this study can be therefore organized according to the temporal phases of memory-construction they touch upon.

2.1 The Past – The Duty to Ascertain the Truth

First of all, the duty of memory digs into the past, influencing the phase of recollection: the creation of narratives. It requires states to delve into the history of the abuses, and to construct a narrative about them. It does so on the legal basis of the obligation to investigate under human rights law, which informs the scope and modalities of this first component. In this first conceptualization, the duty of memory firstly imposes an obligation on states to face their past *tout court*. The clarification of the historical facts amounting to serious crimes is an obligation under human rights law, and excludes the choice for states to turn the page of past

⁷⁴⁰ Booth, “Kashmir Road: Some Reflections on Memory and Violence”, 364-365.

violence, imposing silence and oblivion. This clearly entails a first major constraint on the way states may decide to deal with the trauma of past violence.

International and regional judicial and quasi-judicial bodies have developed criteria to comply with this obligation in practice. Practice suggests that states must carry out comprehensive and thorough investigations in order to discharge their obligation to investigate. Moreover, in cases of the most serious human rights violations, criminal proceedings are indicated as the primary means to ascertain facts and responsibilities, although alternative mechanisms of truth seeking may be added.

The combination of these two criteria, together with the element of publicity which is required for investigation to be adequate, leave an important imprint on the resulting narrative that recounts the violations. This narrative will be filtered through the lens of criminal law – through its rules of procedure and mechanisms –, told by a criminal court, and officially sanctioned as ‘truth’ – although a judicial one. The judicial records produced by the criminal trial concurrently create historical records that will form the basis for the construction of the collective memory within the society. Although admittedly this judicially constructed narrative may be only one of the different voices that concur in representing images of the past within the society, especially in transitional justice contexts, the seal of law endows it with special authority, which may impair the interplay between narratives in the process of memories-negotiation.

It is true that human rights bodies have welcomed the adoption of alternative truth seeking mechanisms, besides the criminal avenue. These mechanisms – the most common being truth and reconciliation commissions - undoubtedly greatly contribute to expanding the scope of investigation to the broader historical context in which the violations took place, overcoming the limits of criminal proceedings. Nevertheless, the analysis has shown that, whilst with regard to the latter a proper legal obligation is generally established, at least for the most serious crimes, the creation of non-judicial mechanisms is left to the political decision of governments. From this, it can be concluded that the current regime of human rights law, considered from the legal ground of the obligation to investigate, expects states to review and interpret the past through the lens of judicial proceedings, but not necessary through other - perhaps more appropriate - means of historical research. The risk is to designate courts as the main party responsible for writing the history of violence and disseminating its accounts. This,

in turn, may diminish the role of other agents – such as professional historians – in the endeavour of truth seeking.

2.2 The Present – The Duty to Disclose

If the duty of memory first asks states to look back at their past, in order to clarify historical facts that amount to gross human rights violations, and eventually to create a narrative about them through the lens of judicial mechanisms of accountability, it subsequently acts in the present by regulating the circulation of knowledge about the past within the society. The management of information related to widespread patterns of state-sponsored violence is crucial for the social processes of reading and interpreting the past. By regulating which information should be made public, and who is entitled to access it, international law influences the representation of narratives about the past and their flow within the society. In this sense, the specific standards and principles developed by international bodies through the interpretation of the provisions regulating the right to access to information in cases of serious human rights violations provide a legal framework for the production and distribution of narratives.

Although not yet clearly established as a binding obligation under general international law, the state duty to disclose information and documents of public interest is progressively emerging in the regional human rights systems, at different levels. The principles of maximum disclosure and public interest override, which inform the legal regime of public information in cases of serious human rights abuses, restrict the state's control over the interpretations and representations of the past, and, in principle, discourage state policies directed at keeping secret information about patterns of state-sponsored violence.

This process of 'democratization of truth seeking',⁷⁴¹ which allows individuals to access information of public relevance, extends its effects to the processes of memory-making. In exactly the same way in which monopolies distort the market, classification policies on materials related to periods of systematic and serious human rights violations distort the social processes of memory-elaboration and production. The progressive affirmation of a duty to disclose increasingly pushes states to adopt policies that create open access to historical documents for the public. In the conceptualization of the right to access to information, the duty of memory thusly facilitates and protects the creation of a pluralistic network of

⁷⁴¹ Stan, *Transitional Justice in Post-Communist Romania*, 60.

individual and collective narratives that emerge and circulate in the society. If citizens have the right to access information about periods of systematic and serious human rights violations, they can feed memories with original sources and contribute to enriching the social dialogue among narratives. In this sense, the duty of memory – stemming from a primary right – deprives states of the monopoly over historical records, and restitutes the ownership over the interpretation of the past and negotiations of narratives to the society by democratizing access to documentary sources.

2.3 The Future – The Duty to Preserve

Construction of, and access to knowledge about the past are the first two steps in which international and human rights law provisions interfere with the memory-making processes, in the two conceptualizations of the state obligation to investigate and the public right to access information. These two underpinnings respectively regulate the production and circulation of information about past human rights abuses, and they consequently ultimately impact on the interpretation and recollection of that history. While the first and second components look at the past and work in the present, respectively, requiring states to carry out an in-depth assessment of the facts and regulating the legal regime of circulation of information that documents serious violations of human rights within the society, the third component examined in the present study turns to the future by requiring states to preserve that information from the passage of time. This was defined as the state duty to collect and preserve documents and records related to past violations. In the revised UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, this duty was significantly referred to as “the duty to preserve memory”.⁷⁴²

Admittedly, in this third conceptualization, the duty of memory is more a set of guiding principles and good practice on record management than a binding norm. Nonetheless, the research has shown how these principles and guidelines are progressively entering into human rights documents and conceived as instruments of human rights protection. In the aftermath of mass violence, under the conceptualization of the right to know – in both its individual and collective dimension –, they guide states in collecting and maintaining documentary sources

⁷⁴² CHR, *Updated Set of Principles to Combat Impunity*, Principle 3.

that enable individuals and society to read the past and they eventually allow the transmission of this knowledge to future generations. In practice, this has finally resulted in regulating the creation and management of human rights archives that document the periods of violence.

If archives are sacred spaces of memory – as this study has argued –, their regulation affects the protection of memory and its transmission throughout time. By indicating criteria to collect and preserve records about human rights abuses, these principles potentially restrict the margin of discretion of states in managing the knowledge about the past once more. If this emerging trend reached the status of binding norm, governments could no longer decide to order the destruction of historical records of past abuses, as their retention would be a duty toward the victims and the society. Moreover, the preservation of sources that document patterns of mass and systematic human rights abuses further serves the interest of the whole international community by preventing the repetition of those events. In this sense, the duty to preserve crosses the borders of secondary obligations, and works as a *momentum* to future generations.

So far, the duty to preserve only goes as far as to require states to implement appropriate legal and administrative frameworks to support the creation and functioning of human rights archives, and to allocate adequate resources to enable them to work effectively. The concrete criteria to select and manage documents are therefore ultimately left up to the discretion of professional categories of archivists. This is certainly a welcome approach. Indeed, the overregulation of archives's management through legal provisions at the international level may deprive the society of the ownership over the local processes of interpreting and negotiating the past, of which archives are an essential component. Nonetheless, the indication of minimum standards which states are to comply with in the management of documents seems an important safeguard for the free debate on history.

2.4 Bridging Past, Present, and Future – The Duty to Commemorate

Along the line between present and future, the duty of memory further takes the shape of the state duty to commemorate, i.e. to undertake and implement forms of commemoration related to periods of state violence. In this thesis, the duty to commemorate has been constructed within the realm of secondary obligations of state responsibility, as part of the obligation to provide reparations for violations of human rights norms. In this conceptualization, the duty of memory is at the same time a backward-looking measure, in that it aims at providing symbolic redress to victims' suffering, and a forward-looking instrument,

in that it provides assurances of non-repetition to both the society and the international community. In this way, it creates a bridge between past traumas and future memories.

This thesis has pointed out the emerging trend of including commemorative measures in the remedial schemes that states are required to adopt in the aftermath of gross human rights violations. This trend was widely supported by the practice of human rights bodies investigated by the study, in particular by the jurisprudence of the Inter-American Court and Commission of Human Rights. It finds further support at the international level in the Basic Principles and Guidelines on the victims' right to reparation, which explicitly include memorialization as a form of satisfaction.

It was argued in this thesis that the inclusion of memory-related measures in the general framework of reparations for massive and systematic patterns of human rights violations contributes to an in-depth reconsideration of the role of reparations in these situations. Commemorative measures, which embody the presence of the past in the present, detach the meaning of reparations from closure with the past – in the classical international law approach of wiping out all the consequence of the violence –, and suggest a healing dialogue to overcome the trauma between past, present, and future instead. In so doing, memory departs from the individual dimension of satisfaction and becomes a vehicle for promoting a collective awareness of the past, claiming that only the public recognition of the past and the preservation of its remembrance may allow for the non-repetition of the same atrocities: “Those who cannot remember the past are condemned to repeat it”.⁷⁴³ The individual dimension of commemoration as a means for healing therefore embeds the collective dimension of the state obligation to provide guarantees of non-repetition in the duty to commemorate as well.

Yet, the construction of memory-related measures as the object of the state obligation to provide for reparations is problematic, both in its individual and collective dimension. Depicting commemoration measures as individual instruments of satisfaction for victims submits them to the criteria of adequacy and proportionality that human rights law expects states to meet when implementing reparations. This means that, for commemorations to be

⁷⁴³ Santayana, G., “Reason in Common Sense”, in *The birth of reason & other essays*, ed Cory, D. (New York: Columbia University Press, 1995).

considered adequate form of reparations, they have to acknowledge and tell victims' narrative, sanctioning their memories through the official recognition of the state. If this entails a welcoming involvement of victims in the processes of defining and drawing reparations, at the same time, these measures may exacerbate battles of memories by impairing the complex dialogue among the different narratives that compete in the public *fora*. Indeed, just like in the case of judicially-constructed accounts of the past, commemorative remedial orders may create different degrees of legitimacy among narratives by granting individual memories the sanction of law.

Through the observation of the legal practice, this research has further pointed toward another shortcoming of enacting commemoration in the form of remedial orders. Indeed, doubts arise as to whether courts should be the competent *fora* in which to negotiate memories, and whether judicial decisions should be the appropriate vehicles for conveying individual memories (or groups' memories) into the broader collective narrative. This is especially problematic in cases in which the remedial orders to commemorate come from supranational organs – as in the case of the IACtHR –, and when adjudicatory bodies are called to assess the adequacy of these measures. The Peruvian case analysed in the relevant section provided an example of these hurdles, and eventually suggested a careful evaluation of the possibility of holding, and modalities of implementing, a duty to commemorate.

2.5 Discussing the Past in the Present - The Duty to Respect and Protect

Memory and history strongly intertwine, and restrictions imposed on the latter necessarily reflect in the first. On this basis, the thesis has explored the role of human rights law and practice in regulating the discussion about the past. This analysis showed that states firstly bear the responsibility to ensure and protect the free and open discussion about historical matters of public relevance, such as the discussion about historical periods which were marked by patterns of systematic human rights violations. Freedom was recognized as the guiding principle which should inform historical debate, both as the expression of the individual scientific and academic freedom of historians and as a form of protection for the collective interest in participating to, and being informed about matters of public relevance, which constitutes a central component of the democratic life of a society. In this way, the duty to respect freedom in historical debate was constructed as a safeguard for ensuring plurality of voices in the public discussion of the past.

By expecting states to ensure and protect the circulation of different narratives and interpretations of historical events that are particularly meaningful for the identity of a society, the international legal system of human rights protection rejects the imposition of official historical narratives and the crystallization of only one truth on the interpretation of the past. Through the analysis of the practice, the thesis has shown that international bodies deny legitimacy to general restrictions imposed by states on historical debates – as in the case of the so-called *lois mémorielles*. They protect even erroneous, incorrect, radical, or disturbing interpretations that belong to that debate under the freedom of expression. In so doing, human rights bodies tend to promote the social process of memories-negotiation, ensuring the same degree of autonomy and freedom to speak in the public sphere to every memories-carrier. This duty was mainly widely supported by the European Court of Human Rights' case law, and was further confirmed by soft law instruments and practice at the international level.

But words matter. They may work as weapons against individual and collective rights and values, and cause great offence and suffering to victims' dignity and honour. Hence, the imperative of freedom in discussing the past is to be reconciled with the same urgency to eradicate infamous distortions of the history of mass crimes from the public debate. This is an increasingly pressing need of modern societies, especially in the Internet era. Whilst in the past negationist messages were confined to restricted *fora* of discussion, and their utterance was easily attributable to a relatively limited number of easily-recognizable individuals who could access a wide range of media or publication systems, the development of the Internet has somehow 'democratized' negationism. The global network of information and social media today offers every individual the opportunity to masquerade as a professional historian, and spread whatever distorted interpretation of history worldwide. Everyone can become an unknown – and therefore hardly punishable – negationist.

The thesis has tried to understand how these two opposite interests, the preservation of freedom in historical debate and the fight against distortion and manipulation of history, have been accommodated in the international practice. Through the analysis of the legal instruments that have been adopted at the international and national level, and the interpretation of the relevant human rights decisions adopted by supranational human rights bodies, this study has eventually indicated the anti-discrimination doctrine and equality as the grounds to delineate the outer limits of the historical debate. In this sense, the state duty to protect the history of

mass crimes against denial and mystifications is aimed at opposing the misuse of history in order to pursue discriminatory and racist acts. In this interpretation, revisions of history are allowed insofar as the arguments used to that purpose do not hide an incitement to hatred and violence, and do not constitute a real threat to public order or other people's rights. A case by case evaluation of the circumstances is always required, and, consequently, mere content-based restrictions to historical discussion are not admissible. This thesis, however, has addressed and critically discussed the 'selective' approach used by adjudicatory bodies - the ECtHR in particular - in Holocaust denial cases, which significantly diverges from the interpretation described so far.⁷⁴⁴ While this different approach is easily explicable from a historical perspective, its coherence with anti-discrimination arguments raises important concerns. Nevertheless, besides this exception, the discussion of the past in the present, within the outer limit of discrimination and racism, is generally preserved against illegitimate interference of governments.

3. Nature and Content of the Duty of Memory

There is no explicit recognition of a state obligation to memory in the texts of general human rights treaties. This thesis has inferred the scope and content of what has been called a 'duty of memory' from the analysis of other existing obligations on states which arise from specific human rights norms. From this analysis, it can be inferred that there is not a state duty of memory under international law in the sense of a general duty to remember the past, *tout court*. Nonetheless, this study has demonstrated that, in the aftermath of mass crimes, several human rights provisions determine legal constraints on the way states decide to deal with their past, and eventually represent and remember it. This thesis, thus, has presented the duty-to-memory-puzzle as the result of the interplay among the above-mentioned duties that influence the relation between a state and its history. This duty rests on different legal bases: the general state obligation to ensure and protect human rights, substantive human rights provisions, and the secondary obligations to provide reparations and guarantees of non-repetition. Overall, this interaction results in a duty for states to undertake positive and negative actions to allow and ensure that events of the past that constitute gross violations of human rights be recognized and remembered. Cumulatively, because of the way these underlying norms have been enshrined in international instruments, interpreted in more or less binding oversight bodies'

⁷⁴⁴ *Supra*, Ch. VI, para. 3.3.2.

decisions, and implemented in the state practice, a duty of memory – in the way that it was described in this thesis – seems to be emerging in the international law framework.

The duty of memory, however, as presented in this study, is certainly not directly enforceable. As such, it does not give rise to individual or collective rights. It does not empower individuals to bring claims before human rights organs, and its breach, as such, cannot be invoked as a foundation for state responsibility either. It is instead a legal consequence of the implementation of existing rights and duties in the field of human rights law, the breach of which can ground state responsibility and legitimate claims from individuals. As an organizing category of distinct legal situations, its capacity to bind states therefore rests upon the degree of recognition and the binding force of the underlying legal rules. Hence, the legally binding nature of the state obligations to clarify and disclose information on gross human rights violations and to ensure freedom in historical debate can be affirmed, albeit with the caveat provided in the respective sections, whereas the state duties to commemorate as a form of reparation to victims and to create human rights archives cannot be considered international obligations yet. Nonetheless, they are both pointing to the establishment of good practice and standards in their respective fields. The first one furthermore can be considered an indication of consolidated regional state practice in the Inter-American context, which is further supported by the broad and consistent case law of the Inter-American institutions.

Since it does not give rise to specific rights, the duty of memory does not directly create right-holders. Nonetheless, since the underpinning foundations have both an individual and a collective component, this double dimension is also reflected in the different duties which compose it. As was pointed out in the respective sections of this study, the duty to ascertain the facts expresses the individual dimension in the victims' rights to know the truth and have access to an effective remedy, whereas the general obligation to ensure and protect human rights underlies the collective one. Similarly, the duty to disclose and the duty to collect and preserve information base their individual and collective component respectively on the individual right to access personal information and the general right of the public to have access to information of public relevance. The duty to commemorate is individual in the conceptualization of the victims' right to obtain satisfaction and collective in its preventative construction. Finally, the duty to respect and protect projects the individual component in the

protection of individuals' freedom of expression, and the collective one in the public right to discuss matter of general interest. This double dimension in turn is mirrored in the overall content of the duty of memory. There is, hence, both an individual and a societal component to the duty of memory.

Finally, as regards the content, the way the duty of memory has been constructed and interpreted in practice seems to presuppose a clear equation between truth and memory. The memory of past atrocities, at least the one channelled through public institutions, has to be built upon the factual clarification of the abuses. The duty of memory requires states to allow societies to construct images of the past on the basis of full and truthful knowledge of the facts (production and disclosure of knowledge about the past). Subsequently, that full and truthful knowledge is to be preserved from the natural passage of time (through the construction and management of archives), from fading memories (through memorializations and commemorations), and from malicious mystifications (through the fight against negationisms). Yet, in line with the Millian understanding of truth, the coexistence of, and dialogue among multiple interpretations of the past are protected from illegitimate interference (through the protection of freedom of historical debate). Whilst the content of the duty of memory admittedly to some extent overlaps with the content of the right to truth, it goes beyond that. Indeed, it requires not only that states investigate and disclose facts, make them public and circulate them in the public domain, but it also requires that the narrative of that past is discussed, remembered, and transmitted.

4. Rationales

The different conceptualizations which underpin the duty of memory that were examined in this thesis shed light on the underlying rationales of this duty. The taxonomy of these main underpinnings forms the conceptual basis. From the analysis of the different elements that constitute the duty of memory, it has emerged that, while distinct and autonomous, these rationales may – and actually do - play and interact to justify interferences of supranational decisions in the relation between a state and its history. Indeed, while in the course of this thesis, each component was consistently defined on both its legal foundation and content, it is argued that the different foundations of the duty of memory strictly bind, and strongly entwine with, each other and their contours often blur and overlap.

The first rationale is the functional argument. It would appear to lie mainly in the right to information – or right to know –, in both its individual and collective dimension. It firstly

justifies the state duties to clarify, collect, preserve, and make accessible information about past human rights violations as enabling instruments to allow individuals to exercise civil and political rights and freedoms, and the society to pursue legitimate interests. The rights to education and culture, which were only mentioned as avenues for future research in this thesis, can also be encompassed in this rationale. For instance, without a state duty to preserve and disclose historical records of the periods of violence, individuals would struggle to obtain information about past violations to vindicate their rights. This has been widely demonstrated by the examples discussed in this work of countries which adopted classification regimes to silence narratives of their ‘dark past’, and to block their circulation in the public sphere. In those situations, even many years after the end of the violations, a pattern of impunity was generally maintained, also due to the lack of information publicly available for lodging complaints before the appropriate body. The functional argument further explains the relationship between the duty of memory and freedom of opinion and expression. On matters of general interest – as patterns of state-sponsored violence committed in the past certainly are –, to deny the state obligation to inquiry into historical injustices, disseminate the findings, and allow plurality of voices to discuss them would deprive individuals of their right to form an opinion free from prejudice and bias about those events, and the public to exercise democratic control over the government’s politics of the past. Finally, the duty of memory is functional to identity. In *Memory and Identity*, Pope John Paul II claims that, through memory, human beings model their sense of identity, both at the collective and the personal level.⁷⁴⁵ In the first part of this thesis, the link between memory and identity was discussed. It was noted that the processes of working through the past and the attribution of symbolic meanings to past traumas are essential steps in the construction of collective identities. Moreover, at the individual level, knowledge of one’s own history is crucial in the construction of the individual self. Massive human rights violations are founding moments of this process of identity building, both at the collective and at the individual level. Indeed, narratives about those constitutive moments ultimately define the identity of a people and its members. Access to the past – in the sense of access to information about those founding moments – is therefore

⁷⁴⁵ Pope John Paul II, *Memory and Identity: Conversations at the Dawn of a Millennium* (New York: Rizzoli, 2005), 144, cited by Judge Cançado Trindade, in his separate opinion to the case *Gutiérrez-Soler v. Colombia*, para. 24.

a precondition for the enjoyment of a number of personal rights related to identity. From this perspective, the duty of memory acts at the level of primary rights.

The second conceptual underpinning of the duty of memory is the remedial rationale. It firstly rests upon the healing nature of memory. Public forms of commemorations are seen as instruments to publicly restore victims' dignity and to allow victims' mourning. As such, they can play a therapeutic role in the individual process of coming to terms with past traumas. This was the main argument used by the Inter-American Court of Human Rights to justify the commemorative remedial orders issued in its extensive case law; this argument, admittedly, may be disputed in consideration of the equally important role of forgetting in the healing process of victims' rehabilitation, which should also be carefully considered from a psychological point of view. Yet, the healing function of memory works mainly lies in the public recognition they provide. Official acknowledgment of the victims' narratives of trauma is in fact the core of the remedial character underlying the duty of memory. Yet, not only commemorations *strictu sensu*, as were examined in the corresponding section of this work, but also the official clarification, public disclosure, and acknowledgement of the historical truth about the abuses are powerful instruments of individual redress. As was discussed in the appropriate section, this was one of the rationales put forth by human rights bodies when requiring states to carry out investigations and disclose information, especially in cases of enforced disappearance. The remedial rationale therefore moves the duty of memory to the level of secondary norms.

The third rationale supporting the duty of memory is the preventative argument. It closely relates to the pedagogical dimension of memory. From this perspective, it is posited that the work of reading, interpreting, discussing, and remembering the history of mass abuses would constitute a guarantee against their repetition in the future: Never Again! The corresponding state duties that the duty-to-memory-puzzle entails are useful to transpose that aspirational guarantee into public actions. This argument is controversial, since it can be disputed that a society that remembers the wrongs committed in the past will not repeat them. Yet, it is a commonly shared view that the knowledge of past atrocities and the suffering they caused would have a deterrent effect on its repetition. In this rationale, the role of education is crucial. On this basis – and correctly in my view –, the preventative rationale was used by international bodies as a powerful argument to push states to clarify historical injustices and to transmit the lesson learnt as a warning to future generations. Many soft law instruments and

court decisions discussed in this study indeed resorted to this rationale to substantiate interferences with the states' discretion in managing information about serious human rights violations. Within the realm of secondary obligations, the duty of memory fits squarely within the category of guarantees of non-repetition.

Grasping the conceptual justifications that underpin the duty of memory is important not only for providing a theoretical foundation, but also to define the scope and content of the specific behaviours that states are required to adopt in compliance with their international commitments concretely. The concrete content and shapes of the memories that will circulate in the society, in fact will be the result of the manner in which those behaviours will be performed in order to meet the specific goals for which they were prescribed.

5. International Law as a Vector of Memory

This long journey concludes with a twofold answer to the question driving this investigation. While there is not an obligation of memory as such, the preservation of the memory of massive human rights violations is seen as of paramount interest to the international community which is protected through international norms and by the supervision of international bodies. Accordingly, states have obligations in respect of the interpretation and representation of the past.

This thesis has put forth the argument that international law is a *vector* of memory. In particular, borrowing the 'presentist approach theory' from the field of sociology and applying it to the international law discourse, it was posited that international law, by influencing the way states affected by patterns of serious human rights violations relate to their past, conveys human rights values and principles into the local and global memory-making processes. This study has presented some of the ways in which international law steps into the processes of production and circulation of knowledge about the past, regulating means which traditionally have been used by governments to select their own collective memories. Through these legal institutions, international law – as an interest-bearer of the human rights discourse – not only influences the process of reconstruction of identity for societies emerging from deep institutional and social crisis, but also contributes to the creation of a global memory, in which mass atrocities are portrayed as symbolic markers for the construction of a human rights-respectful global conscience.

The impact of international law on the memory of mass crimes is twofold.⁷⁴⁶ On the one hand, through international courts and adjudicatory bodies which issue judicial accounts of the abuses, international law *produces* narratives and endows them with the authoritative seal of the law. Likewise, by encouraging or even mandating states to undertake official commemorations of specific traumas, it *tells* memory directly and carves it into the global conscience. In these cases, international law itself becomes a memory-maker. On the other hand, by regulating the production and circulation of information about the past, it indirectly impacts on the construction and transmission of memories at the social level. Considered from this perspective, international law acts as a facilitator of memories. This double interplay between international law and memory impacts on the production of memories both at the official level – the way national institutions publicly tell and commemorate the nation’s past –, and at the social one – in that it introduces and provides instruments for moulding narratives to be circulated and discussed within public *fora*. While in the first case it institutionalizes certain memories, in the second case it provides frameworks through which the past should be filtered and represented. In both cases, however, it defends the memory of the most heinous assaults to human rights against oblivion, as a moral imperative of the international community.

Notably, by providing rules and standards for the production and circulation of knowledge about past atrocities, international law acts as a guarantor protecting against the political manipulation of the past and the imposition of official memories by governments. Yet, as this study has shown, placing the role of *vector* of memory on international law may eventually lead to worrisome shortcomings. Rather than acting as a safeguard for the democratic processes of working through the past and negotiating memories, it may end up crystallizing some narratives, masqueraded in the clothes of historical truths, through the language of the law. If international actors want to resort to international law to venture into the intricate and sensitive processes of making sense of past atrocities, and to perpetuate their remembrance in the striving for *Nunca Mas!*, they should refrain from the temptation of using the law as a weapon to write history and impose memories. When stepping into the relation between a violence-torn society and its past, international organs should be aware – and respectful – of the internal struggles for identity and reconstruction which their decisions will

⁷⁴⁶ This twofold impact of the law on memory was explained by Savelsberg and King, “*Law and Collective Memory*”, 190. Also Hirsh, “Collective Memory and International Law.”

impact upon. They should listen to the existing social narratives and understand their inter-relations. In doing so, as interpreters and bearers of human rights values, international human rights bodies can refrain from playing the role of memory-makers, which impose specific interpretations of the past with a top-down approach, and rather embrace the role of memory-facilitators, promoting and protecting the interplay of different voices involved in the process of rethinking the past.

Let me conclude in the same way that this journey started.

The passing of time imposes (...) the duty of remembrance and emphasizes the need for it. Each person has a “spiritual patrimony” to preserve, hence the need to cultivate memory to preserve identity, both at personal and collective levels. Oblivion enhances the vulnerability of the human condition, and cannot be imposed (not even by “legal” contrivances, such as amnesty or the statute of limitations): there is an ethical obligation of remembrance.⁷⁴⁷

This ethical duty progressively seems to emerge as a legal duty for states. This thesis has indicated some of the routes through which this process is taking place in the international legal discourse. Yet, more pieces could be identified to complete the puzzle, and ethical considerations about the possibility of framing a duty of memory in legal terms should be addressed in other *milieux*. The end of this journey, hence, opens up new directions for the next expedition.

⁷⁴⁷ IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Separate Opinion of Judge A. A. Cançado Trindade, “El Deber de Memoria y Su Necesidad”, para III.

Bibliography

Abrams, Lynn. *Oral history theory*. London: Routledge, 2010.

Agamben, Giorgio. "Time and History." In *Infancy and history: on the destruction of experience*, 89-106. London; New York: Verso, 2007.

Agamben, Giorgio. "Cattive memorie". *Il Manifesto*. December 23, 1997.

Ago, Roberto. "Second Report on State Responsibility." *Yearbook of International Law Commission* 2 (1970): 177-197.

Alexander, Jeffrey C. "Toward a Cultural Theory of Trauma." In *Cultural Trauma and Collective Identity*, 1 – 30. Berkeley: University of California Press, 2004.

Almqvist, Jessica, Esposito Carlos, eds. *The role of courts in transitional justice: voices from Latin America and Spain*. Milton Park, Abingdon, Oxon; New York: Routledge, 2011.

Althusser, Louis, Balibar, Etienne. *Reading Capital*. London: NLB, 1977.

Antkowiak, Thomas, M. "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond." *Columbia Journal of Transnational Law* 46 (2008): 351-419.

Anzilotti, Dionisio. "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers." *Revue générale de droit international public* 13 (1906), 5-285.

Arendt, Hanna. "The Concept of History." In *Between past and future: eight exercises in political thought*, 41-90. New York: Penguin Books, 1978.

Aristotle. *De Memoria ed Reminiscentia*. In *On the Soul, Parva Naturalia, On Breath*. Translated by Walter S. Hett, 288- 313. Cambridge: Harvard University Press; London: W. Heinemann, 1975.

Arthur, James, Phillips, Robert, eds. *Issues in History Teaching*. London: Routledge, 1999.

Assmann, Jan. "Collective memory and Cultural Identity". *New German Critique* 65, (1995): 125-133.

Bakker, Christine. "Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State." In *War by contract: human rights, humanitarian law, and private contractors*. Edited by Francesco Francioni and Natalino Ronzitti, 130 – 149. Oxford: Oxford University Press, 2011.

Barahona De Brito, Alexandra, Enriquez, Carmen Gonzalez, Aguilar, Paloma. *The Politics of Memory and Democratization*. New York: Oxford University Press 2001.

Barkan, Elazar, Karn, Alexander, eds. *Taking wrongs seriously. Apologies and reconciliation*. Stanford, Stanford University Press, 2006.

Barkan, Elazar. *The Guilt of Nations: Restitution and Negotiating Historical Injustices* New York: Norton, 2000.

Barsalou, Judy, Baxter, Victoria. "The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice." Washington, DC: United States Institute of Peace, 2007. Available at: <http://www.usip.org/publications/the-urge-remember-the-role-of-memorials-in-social-reconstruction-and-transitional>.

Bartolini, Giulio. "Reparation For Violations Of Human Rights: Possible Co-Ordination In The Case-Law Of International Supervisory Bodies." *Federalismi.it* 15 (2009).

Bartolini, Giulio. *Riparazione per violazione dei diritti umani e ordinamento internazionale*. Napoli: Jovene, 2009.

Bassiouni, M. Cherif. "The Protection of Collective Victims in International Law." *New York Law School of Human Rights Annual* 2 (1984): 239 – 257.

Bassiouni, M. Cherif. *The Pursuit of International Criminal Justice: A world Study on Conflicts, Victimization and Post Conflict Justice*, vol. 2. Oxford: Intersentia, 2010.

Batchelor, Diana. "Performing reconciliation: a performance approach to the analysis of political apologies." In *Critical Perspective to Transitional Justice*, 347 - 368. Edited by Nicola Palmer, Phil Clark, Danielle Granville. Cambridge: Intersentia, 2012.

Belavusau, Uladzislau. "Freedom of Expression: European and American constitutional models for Central and Eastern Europe." Ph.D. Thesis, European University Institute, 2011.

Belavusau, Uladzislau. "Historical Revisionism in Comparative Perspective: Law, Politics and Surrogate Mourning." EUI Working Papers Series. Florence: European University Institute, 2013.

Belavusau, Uladzislau. *Freedom of speech : importing European and US constitutional models in transitional democracies*. London ; New York : Routledge, 2013.

Bell, Christine. "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'." *International Journal of Transitional Justice* 3, no. 1 (2009): 5 – 27.

Bellamy, Alex J., Davies, Sara E., Glanville, Luke, eds. *The responsibility to protect and international law*. Leiden, Boston, Martinus Nijhoff Publishers: 2011.

Benjamin, Walter. "Theses on the Philosophy of History." In *Illuminations*, edited by Hanna Arendt, 245-258. London: Fontana, 1973.

Beristain, Carlos Maria. *Diálogos sobre la reparación: Experiencias en el sistema interamericano de derechos humanos*. San José, CR: Instituto Interamericano de Derechos Humanos, 2008.

Bertrand, Romain. *Mémoires d'empire: La controverse autour du 'fait colonial'*. Bellecombe-en-Bauges: Croquant, 2006.

Bevernage, Berber. *History, Memory and State Sponsored Violence: time and justice*. New York: Routledge, 2012.

Bickford, Louis. "Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay." *Latin American Research Review* 35, no. 2 (2000):160-182.

Bickford, Louis, Sodaro, Amy. "Remembering Yesterday to Protect Tomorrow: The Internalization of a New Commemorative Paradigm." In *Memory and the Future: Transnational Politics, Ethics and Society*, edited by Yifat Gutman, Adam D. Brown and Amy Sodaro, 66 – 89. New York: Palgrave MacMillan, 2010.

Bickford, Louis. "The Power of Memorials: Human Rights, Justice and the Struggle for Memory." Paper presented at the ICTJ/JICA Conference, Cape Town, South Africa, 29 March 2005.

Bickford, Louis. "Transitional Justice." In *Encyclopedia of Genocide and Crimes Against Humanity*, vol. 3. Edited by Dinah Shelton, 1045-1047. Detroit: Macmillan Reference USA, 2004.

Bickford, Louis. "The Archival Imperative: Human Rights and Historical Memory in Latin America's Southern Cone." *Human Rights Quarterly*, 21 no.4 (1999): 1097-1122.

Bishop, Cheryl Ann. "Internationalizing the right to know: Conceptualizations of access to information in human rights law". Ph.D. Thesis, University of North Carolina, 2009.

Bloch, Pascale. "Response to Professor Fronza's the Punishment of Negationism." *Vermont Law Review* 30 (2006): 627-643.

Boban, Ljubo. "Notes and Comments: Jasenovac and the Manipulation of History." *East European Politics & Societies* 4, no. 3 (September 1990): 580-592.

Booth, James W. "Kashmir Road : Some Reflections on Memory and Violence, Millennium." *Journal of International Studies* 38, no. 2 (2009): 361-377.

Booth, James W. "The Unforgotten: Memories of Justice". *The American Political Science Review* 95, no. 4, (December 2001): 777-791.

Booths, James W. *Communities of memory: on witness, identity, and justice*. Ithaca: Cornell University Press, 2006.

Bowring, Bill. "The ECtHR Grand Chamber judgment in Kononov v Latvia (17 May 2010): is the Russian Federation correct in its understanding of the relationship between politics and international law?" *International Justice* 2, no.3 (2012): 7.

Boyle, Alan E. "Some reflections on the Relationship of Treaties and Soft Law." In *Multilateral treaty-making: the current status of challenges to and reforms needed in the international legislative process*. Edited by Vera Gowlland-Debbas, 25-38. The Hague; Boston: M. Nijhoff, 2000.

Boyle, Alan E. "State Responsibility and International Liability for Injuries Consequences of Acts Not Prohibited by International Law. A Necessary Distinction." *International and Comparative Law Quarterly* 39, no. 1 (1990): 1–26.

Boyle, Kevin. "Hate Speech--The United States Versus the Rest of the World." *Maine Law Review* 53 (2001): 487-502.

Brants, Christine, Hol, Antonie, Siegel, Dina. *Transitional Justice. Images and Memories*. Farnham, Surrey, England: Ashgate, 2013.

Braudel, Fernand. *Ecrits sur l'histoire*. Paris: Flammarion, 1969.

Brems, Eva. "Transitional Justice in the Case Law of the European Court of Human Rights." *The International Journal of Transitional Justice* 5 (2011): 282–303.

Burgorgue-Larsen, Laurence. *The Inter-American Court of Human Rights: case-law and commentary*. Oxford: Oxford University Press, 2010.

Buyse, Antoine, "Articles 10 and 17 ECHR." In *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*, edited by Eva Brems, Janneke Gerards, 183-209. New York: Cambridge University Press, 2014.

Buyse, Antoine. "The Truth, The Past and the Present." In *Transitional Jurisprudence and the ECHR. Justice, Politics and Rights*, edited by Antoine Buyse, and Michael Hamilton, 131-150. Cambridge, Cambridge University Press, 2001.

Buyse, Antoine. *Margins of conflict: the ECHR and transitions to and from armed conflict*. Antwerp: Intersentia, 2011.

Cajani, Luigi. "Criminal Laws on History. The Case of the European Union." *Historiein* 11 (2011): 19-48.

Campisi, Maria Chiara. "From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights." *International Journal of Conflict and Violence* 8, no. 1 (2014): 61 – 74.

Cannie, Hannes, Dirk Voorhoof. "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" *Netherlands Quarterly of Human Rights* 29, no.1 (2011): 54 – 83.

Cassese Antonio. *Diritto internazionale*, a cura di Paola Gaeta. Bologna: Il Mulino 2005.

Chandernagor, Françoise. "L'enfer des bonnes intentions." *Le Monde*. December 16, 2005.

Chevalier-Watts, Juliet. "Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?" *The European Journal of International Law* 21, no. 3 (2010): 701-721.

Citroni, Gabriella. *L'orrore rivelato: l'esperienza della Commissione della verità e riconciliazione in Perù, 1980-2000*. Milano: Giuffrè, 2004.

Ciurlizza, Javier. "Sentencia de la Corte Interamericana de Derechos Humanos. Caso Penal Miguel Castro Castro versus Perú". *Memorial "El Ojo que Lloro"*, 5 January 2007. Available at: <http://memorialelojoquellora.blogspot.it>

Closa Montero, Carlos. "Dealing With The Past: Memory And European Integration." Jean Monnet Working Paper 01/11. *The Jean Monnet Working Paper Series*. New York: NYU School of Law, 2011.

Closa Montero, Carlos. *Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States*. European Commission, JLS/2008/C4/006: 2010. Available at: http://ec.europa.eu/justice/doc_centre/rights/doc_rights_intro_en.htm

Cohen Jonathan, Gérard. "Négationnisme et droits de l'homme." *Revue trimestrielle des droits de l'homme* 32 (1997): 571-598.

Cohen, Stanley. "State crimes of previous regimes: Knowledge, accountability, and the policing of the past". *Law & Social Inquiry* 20, no.1, (1995): 7-50.

Cohen, Stanley. *States of Denial: Knowing about atrocities and suffering*. Cambridge: Polity Press; Malden, MA: Blackwell, 2001.

Cohen, Stanley. *States of Denial: Knowing about atrocities and suffering*. Cambridge: Polity Press; Malden, MA: Blackwell, 2001.

Combacau, Jean, Alland, Denis. "'Primary' and 'secondary' rules in the law of State responsibility categorizing international obligations." *Netherlands Yearbook of International Law* 16 (1985): 81-109.

Comisión de la Verdad y Reconciliación (Peru). *Informe Final*. Lima: CVR, 2003. Available at www.cverdad.org.pe/ifinal/index.php

Confino, Alon. "Collective Memory and Cultural History: Problems of Method." *The American Historical Review* 102, no. 5 (December, 1997): 1386-1403.

Conforti, Benedetto. *Diritto Internazionale*. Napoli: Editoriale scientifica, 2002. VIII Edition.

Coomans, Fons, Grünfeld, Fred, Westendorp, Ingrid, Willems, Jan, eds. *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven*. The Hague; Boston, MA: Kluwer Law International, 2000.

Coppel, Philip. *Information rights: law and practice*. Oxford : Hart Publishing, 2014. 4th Edition.

Council of Europe, ed. *Yearbook of the European Convention on Human Rights, European Commission of Human Rights, Documents and Decisions (1955-1956-1957)*. Martinus Nijhoff Publishers: 1959.

Cox, Richard. "Archives, War, and Memory: Building a Framework." *Library & Archival Security* 25, no.1 (2012): 21-57.

Crawford, James. "The ILC's Articles On Responsibility Of States For Internationally Wrongful Acts: A Retrospect." *American Journal Of International Law* 96 (2002): 874-890.

Crook, John R. "The United Nations Compensation Commission. A new structure to enforce State responsibility." *American Journal of International Law* 87 (1993): 144-157.

Cubitt, Geoffrey. *History and Memory*. Manchester and New York: Manchester University Press, 2007.

Danieli, Yael. "Massive Trauma and the Healing Role of Reparative Justice." In Ferstman, *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making*, 41-77.

Dante Alighieri. *La divina commedia di Dante Alighieri* [electronic resource]. T.I.: Londra [i.e. Leghorn?], [1778].

De Greiff, Pablo, ed. *The Handbook of Reparations*. Oxford: Oxford University Press, 2006.

De Greiff, Pablo. "The role of apologies in national reconciliation processes." In *The Age of Apology*, edited by Mark Gibney, 120-136. Philadelphia, University of Pennsylvania Press, 2007.

Della Morte, Gabriele. *Le amnistie nel diritto internazionale*. Milano: CEDAM, 2011.

Della Morte, Gabriele. "The Duty of Memory and the Right to Oblivion". *International Criminal Law Review* 14 (2014): 427-440.

Derrida, Jacques. *Specters of Marx: the state of the debt, the work of mourning, and the New international*. New York: Routledge, 1994.

Dieter Beiter, Klaus. *The Protection of the Right to Education by International Law*. Leiden: Martinus Nijhoff Publishers: 2006.

Doty, William G. *Mythography: The Study of Myths and Rituals*. Tuscaloosa: University of Alabama Press, 1986.

Douglas, Lawrence. *The memory of judgment: making law and history in the trials of the holocaust*. New Haven; London: Yale University Press, 2001.

Drinot, Paulo. "For Whom the Eye Cries: Memory, Monumentality, and the Ontologies of Violence in Peru". *Journal of Latin American Cultural Studies* 18, no.1 (2009): 15-32

Drumbl, Mark. "What Historical Narratives Are the Iraqi Trials Developing?" In *Saddam on Trial*, edited by Michael P. Scharf and Gregory Mc Neal, 212-215. Durham, N.C.: Carolina Academic Press, 2006.

Drumbl, Mark. *Atrocities, Punishment, and International Law*. Cambridge; New York: Cambridge University Press, 2007.

Dupuy, Pierre Marie. "A general Stocktaking of the Law of Responsibility." *European Journal of International Law* 13, no.5 (2002): 1053-108.

Dupuy, Pierre Marie. "Reviewing the Difficulties of Codifications - On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility." *European Journal of International Law* 10, no.2 (1999): 371-385.

Dupuy, Pierre Marie. *Droit International Public*. Paris: Dalloz, 2005. 8th edition.

Dupuy, Rene Jean. "Declaratory Law and Programmatic Law; from Revolutionary Custom to 'Soft Law'." In *Declaration on Principles, A Quest For Universal Peace*, edited by Robert J. Akkerman, Peter J. van Krieken, Charles O. Pannenberg, 247-257. The Hague: Kluwer Law International, 1977.

ECtHR, Research Division. *Cultural rights in the case-law of the European Court of Human Rights*. Edited by Council of Europe. January 2011.

Eide, Asbjørn, ed. *Food as a human right*. Tokyo: United Nations University, 1984.

Eide, Asbjørn. "Universalization of Human Rights versus Globalization of Economic Power." In Coomans, *Rendering Justice to the Vulnerable*, 99-121.

EU Network of Independent Experts on Fundamental Rights. *Combating Racism and Xenophobia*. Op. n. 5-2005, 28 November 2005, available at: <http://ec.europa.eu/justice/fundamental-rights>.

Evans, Richard J. *Lying about Hitler: history, Holocaust and the David Irving trial*. New York: Basic Books, 2001.

Farrior, Stephanie. "Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech". *Berkeley Journal of International Law* 14, no. 1 (1996): 1-98.

Fentress, James and Wickham, Chris. *Social Memory*. Oxford, UK ; Cambridge, Mass: Blackwell, 1992.

Ferstman, Carla, Goetz, Mariana, Stephens, Alan, eds. *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making*. Leiden; Boston: Martinus Nijhoff Publishers, 2009.

Feyter, Koen de, Parmentier, Stephan, Bossuyt, Marc, Lemmens Paul, eds. *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerpen: Intersentia 2005.

Fierens, Jaques. "Gacaca Courts: Between Fantasy and Reality." *Journal of International Criminal Justice* 3, no. 4 (2005): 896-919.

Finley, Moses I. "Myth, Memory, and History". *History and Theory* 4, no. 3 (1965): 281-302.

Fitzmaurice, Malgosia, Elias, Olufemi. *Contemporary issues of the law of treaties*. Utrecht: Eleven International Publishing, 2005.

Francioni, Francesco. "Beyond State Sovereignty: The Protection Of Cultural Heritage As A Shared Interest Of Humanity." *Michigan Journal of International Law* 25, no.4 (2004): 1209-1226.

Francioni, Francesco. "Culture, Heritage and Human Rights: An Introduction." In *Cultural Human Rights*, edited by Francesco Francioni and Martin Sheinin, 1-15. Leiden; Boston: Martinus Nijhoff Publishers, 2008.

Francioni, Francesco. "The Rights of Access to Justice under Customary International Law." In *Access to Justice as a Human Right*, edited by Francesco Francioni, 1-55. New York: Oxford University Press, 2007.

Fraser, David. "Law, Lawyers and the Holocaust: The Case Against Vichy France." *Holocaust Genocide Studies* 12, no. 1 (1998):139-158.

Fraser, David. "On the Internet, Nobody Knows You're a Nazi: Some Comparative Legal Aspects of Holocaust Denial on the WWW." In Hare and Weinstein, *Extreme Speech and Democracy*, 511-537.

Frisch, Michael. "Oral history and Hard Times: A review essay." *The Oral History Review* 7 (1979): 70-79.

Fronza, Emanuela. "Diritto e memoria. Un dialogo difficile". *Novecento* 48, no.1 (2004): 47-59.

Fronza, Emanuela. "The Criminal Protection of Memory." In Hennebal and Hochmann, *Genocide Denials and the Law*, 155-181.

Fronza, Emanuela. "The Punishment of Negationism: The Difficult Dialogue between Law and Memory." *Vermont Law Review* 30 (2006): 609-626.

Fronza, Emanuela. *Il negazionismo come reato*. Milano: Giuffr , 2012.

Fuentes Becerra, Diana M., and Cote Barco, Emilio. "El papel de las comisiones de la verdad en la formaci n de la memoria hist rica:  Construcci n de un relato?" Thesis, Pontificia Universidad Javeriana, 2004.

Fujimura-Fanselow, Kumiko, ed. *Transforming Japan: How Feminism and Diversity Are Making a Difference*. New York: Feminist Press, 2011.

Gaeta, Paola. "Are victims of serious violations of international humanitarian law entitled to compensation?" In *International humanitarian law and international human rights law : pas de deux*, edited by Orna Ben-Naftali, 305-327. New York: Oxford University Press, 2011.

Gaeta, Paola. "Inherent Powers of International Courts and Tribunals." In *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, edited by Lal Chand Vorhah et al. eds., 353-372. The Hague; New York: Kluwer Law International, 2003.

Gallagher, Tom. "My neighbour, my Enemy: The Manipulation of Ethnic Identity and the Origins and Conduct of War in Yugoslavia." In *War and Ethnicity: Global Connections and Local Violence*, edited by David Turton, 47-75. San Marino: University of Rochester Press, 1997.

Garibian, Sevane. "Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law." *Cardozo Journal of Conflict Resolution* 9, no. 2 (2008): 479-488.

Gattini, Andrea. "The UN Compensation Commission: Old Rules, New Procedures on War Reparations." *European Journal of International Law* 13, No. 1 (2002): 161-181.

Gedi, Noa, Elam, Yigal. "Collective Memory – What Is It?" *History and Memory* 8, no. 1 (1996): 30-50.

Gerards, Janneke. "How to improve the necessity test of the European Court of Human Rights." *International Journal of Constitutional Law* 11, no. 2 (2013): 466-490.

Gibney, Mark, Howard-Hassmann, Rhoda E., Coicaud, Jean-Marc, and Steiner, Niklaus, eds. *The age of apology: facing up to the past*. Philadelphia: University of Pennsylvania Press, 2008.

Ginzburg, Carlo. "La prueba, la memoria y el olvido." *Contrahistorias. La Otra Mirada De Clio* 14 (2010): 105-116.

Goldstone, Richard J. "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals." *New York University Journal of International Law and Politics* 28 (1996): 485-502.

Gómez Isa, Felipe, ed. *El derecho a la memoria*. Alberdania, Bilbao: Instituto de Derechos Humanos Pedro Arrupe-Diputación de Guipúzcoa, 2006.

González Quintana, Antonio. *Archival Policies In The Protection Of Human Rights*. Translated by Margaret Turner. Paris: International Council on Archives, 2009.

González Quintana, Antornio., *An updated and fuller version of the report prepared by UNESCO and the International Council on Archives (1995), concerning the management of the archives of the state security services of former repressive regimes*. Paris: International Council on Archives, 2009.

Groenhuijsen, Marc, Letschert, Rianne, eds. *Compilation of International Victims' Rights Instruments*. Nijmegen: Wolf Legal Publishers, 2006.

Groome, Dermot. "The Right to Truth in the Fight Against Impunity." *Berkley Journal of International Law* 29, n° 1, 2011: 101-125.

Gutman, Yifat, Brown, Adam D., Sodaro, Amy, eds. *Memory and the Future. Transnational Politics, Ethics and Society*. Basingstoke; New York: Palgrave Macmillan, 2010.

Guzman, Andrew T., Meyer, Timothy L. "International Soft Law." *The Journal of Legal Analysis* 2, no. 1, 2011: 171-225.

Habermas, Jürgen. "L'uso pubblico della storia." In *Germania: un passato che non passa. I crimini nazisti e l'identità tedesca*. Edited by Gian Enrico Rusconi, 98-109. Torino: Einaudi, 1987.

Hajdinjak, Marko. "From Organized Oblivion to Forced Remembering: Memory and Identity among Serbs and Croats." Paper presented at the international symposium "The Memory of Violence/Genocide: Its Meaning in the Process of Peace Building.", University of Tokyo, Tokyo, March 18, 2006. Available at:
http://pdc.ceu.hu/archive/00003871/01/Memory_and_identity.pdf

Hajek, Andrea. "Challenging dominant discourses of the past: 1968 and the value of oral history." *Memory Studies* 6, no.1 (2013): 3- 6.

Halbwachs, Maurice. *La mémoire collective*. First published 1950. Revised edition by Gérard Namer. Paris: Albin Michel, 1994.

Halbwachs, Maurice. *La Topographie légendaire des Évangiles en Terre sainte. Étude de mémoire collective*. First published 1941. Edited by Marie Jaisson, with the contribution of Danièle Hervieu-Léger, Jean-Pierre Cléro, Sarah Gensburger, and Éric Brian. Paris: Presses Universitaires de France, 2008.

Halbwachs, Maurice. *Les Cadres Sociaux de la Mémoire*. First published 1925. Paris: Albin Michel, 1994.

Halbwachs, *On Collective Memory*. Edited and translated by Lewis A. Coser. Chicago: University of Chicago Press, 1992.

Hamber, Brandon, Palmay, Ingrid. "Gender, Memorialization, and Symbolic Reparations." In Rubio Marín, *The Gender of Reparations*, 324-380.

Hamber, Brandon, Wilson, Richard. "Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies." *Journal of Human Rights* 1, n° 1(2003): 35-53.

Hamber, Brandon, Ševčenko, Liz, Naidu, Ereshnee. "Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition." *The International Journal of Transitional Justice* 4, no. 3 (2010): 397-420

Hamber, Brandon. "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition." In De Greiff, *The Handbook of Reparations*, 560-582.

Hamber, Brandon. *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health*. New York: Springer, 2009.

Hare, Ivan, Weinstein, James, eds. *Extreme Speech and Democracy*. Oxford; New York: Oxford University Press, 2009.

Hayner, Priscilla. *Unspeakable truths: confronting state terror and atrocity*. New York; London: Routledge, 2001.

Hayner, Priscilla. *Unspeakable truths: transitional justice and the challenge of truth commissions*. New York: Routledge, 2011.

Hennebel, Ludovic, Hochmann, Thomas. *Genocide Denials and the Law*. New York; Oxford: Oxford University Press, 2011.

Herz, Michael, Molnar, Peter, eds. *The Content and Contest of Hate Speech*. Cambridge; New York: Cambridge University Press, 2012.

Hins, Wouter, Voorhoof, Dirk. "Access to State-Held Information: A Fundamental Right." *European Constitutional Law Review* 3, no. 1 (2007): 114-126.

Hirsch, Herbert. *Genocide and The Politics of Memory: Studying Death to Preserve Life*. Chapel Hill: University of North Carolina Press, 1995.

Hirsch, Moshe. "Collective Memory and International Law." *ESIL Reflections* 3, no. 7. September 17, 2014. Available at: <http://www.esil-sedi.eu/>.

Hite, Catherine. "The Eye that Cries": The Politics of Representing Victims in Contemporary Peru." *Contracorriente* 5, no. 1 (2007): 108–134.

Hobsbawm, Eric and Ranger, Terence, eds. *The Invention of Tradition*. Cambridge: Cambridge University Press 1983.

Hoepken, Wolfgang. "War, Memory and Education in a Fragmented society: The Case of Yugoslavia". *East European Politics and Societies* 13, no.1 (1999): 190-227.

Hutton, Patrick H. "Collective Memory and Collective Mentalities." *Historical Reflections* 15, no. 2 (Summer 1988): 311-322.

Ignatiff, Michael. "Articles of Faith." *Index of Censorship* 25, no.5 (1996): 110-122.

Jennings, Robert Y. "What is International Law and How do We Tell It When We See It?" *Annuaire Suisse de Droit International* XXXVII (1981): 59-88.

Jimerson, Randall. "Archives and memory." *OCLC Systems & Services: International digital library perspectives* 19, no.3 (2003): 89-95.

Joinet, Louis, Canavaggio, Perrine. "Les archives contre l'oubli." *Le Monde*, June 22, 2004.

Karstedt, Susanne. "Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice." *Law & Policy* 20, no. 1 (1998): 15–56.

Karstedt, Susanne. *Legal Institutions and Collective Memories*. Oxford; Portland: Hart Publishing, 2009.

Kiza, Ernesto, Rathgeber, Corene, Rohne, Holger C. "Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes Towards Addressing Atrocities." Hamburg: Hamburg Edition online, 2006.

Knechtle, John C. "Holocaust Denial and the Concept of Dignity in the European Union." *Florida State University Law Review* 36, no.1 (2008) 41-65.

Koskeniemi, Martti. "Between Impunity and Show Trials." *Max Planck Yearbook of United Nations Law* 6 (2002): 1-35

Koskeniemi, Martti. "Human Rights Mainstreaming for Institutional Power." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1, no. 1 (2010): 44-58.

Koskeniemi, Martti. "The Politics of International Law." *European Journal of International Law* 1 (1990): 4 – 32.

Kučs, Artūrs. "Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies." *Journal of Ethnic and Migration Studies* 40, no. 2 (2014): 301-319.

Lanegran, Kimberly R. "Truth Commissions, Human Rights Trials, and the Politics of memory." *Comparative Studies of South Asia, Africa and the Middle East* 25 no. 1 (2005): 111-121.

Lanni, Adriaan. "Transitional Justice in Ancient Athens: A Case Study." *University of Pennsylvania Journal of International Law* 32, no. 2 (2010): 551-594.

Lattanzi, Flavia. *Garanzie dei diritti dell'uomo nel diritto internazionale generale*. Milano: Giuffr , 1983.

Lavrysen, Laurens. "The scope of rights and the scope of obligations: positive obligations." In *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of human rights*. Edited by Eva Brems, and Janneke Gerards, 162-182. New York: Cambridge University Press, 2014.

Lemarchand, Rene. *Forgotten Genocides: Oblivion, Denial, and Memory*. Philadelphia: University of Pennsylvania Press, 2011.

Lenzerini, Federico, ed. *Reparations for Indigenous Peoples: International and Comparative Perspectives*. New York: Oxford University Press, 2008.

Lessa, Francesca. *Memory and transitional justice in Argentina and Uruguay. Against impunity*. New York: Palgrave Macmillan, 2013.

Levy, Daniel, Sznajder, Natan. *Human Rights and Memory*. Pennsylvania Park, Pennsylvania State University Press, 2010.

Lewy, Guenter. *Outlawing genocide denial: the dilemmas of official historical truth*. Salt Lake City: The University of Utah Press, 2014.

Liakos, Antonis. "How to deal with tormented pasts". *Historein*, 11 (2011): 5-9.

Limpens, Jean, Kruithof, Robert, Meinertzhagen-Limpens, Anne. "Liability for One's Own Act". In *International Encyclopedia of Comparative Law*, vol. XI, ch. 2. Edited by André Tunc. Tübingen: Mohr, 1979.

Lipstadt, Deborah E. *Denying the Holocaust: The Growing Assault on Truth and Memory*. New York: Free Press; Toronto: Maxwell Macmillan Canada; New York: Maxwell Macmillan International, 1993.

Lobba, Paolo. "A European Halt to Laws Against Genocide Denial?" *European Criminal Law Review* 4, no.1 (2014): 59-77.

Lollini, Andrea. *Costituzionalismo e giustizia di transizione: il ruolo costituyente della Commissione sudafricana verità e riconciliazione*. Bologna: Il Mulino, 2005.

Löytömäki, Stina. "Committing the irreparable: Law and dealing with past injustice." Ph.D. thesis, European University Institute, 2010.

Löytömäki, Stina. "The Law and Collective Memory of Colonialism: France and the Case of 'Belated' Transitional Justice." *The International Journal of Transitional Justice* 7, No. 2 (2013): 1-19.

Löytömäki, Stina. *Law And The Politics Of Memory. Confronting The Past*. New York: Routledge. 2014.

MacDonald, David B. *Identity Politics in the Age of Genocide. The Holocaust and historical representation*. London; New York: Routledge, 2008.

MacMaster, Neil. "The torture controversy (1998-2002): Towards a 'new history' of the Algerian war?" *Modern & Contemporary France* 10, no. 4 (2002): 449-459.

Mallinder, Louise. "Can Amnesties and International Justice be Reconciled?" *International Journal of Transitional Justice* 1 (2007): 208-230.

Manetti, Michela. Libertà di pensiero e negazionismo. In *Informazione, potere, libertà*. Edited by Michele Ainis, 41. Torino: Giappichelli, 2005.

Margalit Avishai. *The ethics of memory*. Cambridge, MA: Harvard University Press, 2002.

Markovits, Inga. "Selective Memory: How the Law Affects What We Remember and Forget about the Past: The Case of East Germany." *Law & Society Review* 35, no. 3 (2001): 513-563.

Matsuda, Matt. *The Memory of the Modern*. New York: Oxford University Press, 1996.

McDonagh, Maeve. "The Right to Information in International Human Rights Law." *Human Rights Law Review* 13, no. 1 (2013): 1-31.

Meagher, Dan. "Regulating History: Australian Racial Vilification Law and History Denial." *University of Queensland Law Journal* 24 (2005): 499-532.

Mégret, Frédéric. "Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice." *Buffalo Human Rights Law Review* 16, no. 1 (2010): 1-56

Mendel, Toby. "Does International Law Provide for Consistent Rules on Hate Speech?" In Herz and Molnar, *The Content and Contest of Hate Speech*, 417 – 429.

Méndez, Juan E. "The Right to Truth", in *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998*. Edited by Christopher, C. Joyner, and Cherif M. Bassiouni, 255-278. Ramonville St. Agnes: Eres, 1998.

Méndez, Juan E. "An Emerging 'Right to Truth:' Latin-American Contributions." In Karstedt, *Legal Institutions and Collective Memories*, 39-61.

Méndez, Juan E. "Editorial Note." *The International Journal of Transitional Justice* 3, no.2 (2009): 157-162.

Méndez, Juan E. "Individual Accountability for Human Rights Violations." In *Global Standards, Local Action: 15 Years Vienna World Conference on Human Rights*. Edited by Wolfgang Benedek et al., 69-71. Intersentia, 2009.

Méndez, Juan E., Bariffi, Francisco. "Right to Truth – International Protection." In *Max Planck Encyclopedia of Public International Law*. New York, Oxford University Press, 2011.

Mettraux Guénaél, ed. *Perspective on the Nuremberg Trial*. Oxford, New York: Oxford University Press, 2008.

Mill, John Stuart. *On Liberty*. Edited by David Bromwich and George Kateb. New Haven; London: Yale University Press, 2003.

Miller, Paul B. "Contested memories: the Bosnian genocide in Serb and Muslim minds." *Journal of Genocide Research* 8, no. 3 (2006): 311-324.

Milton, Cynthia E. "Defacing Memory: (Un)tying Peru's Memory Knots." *Memory Studies* 4, no.2 (2011): 190-205.

Milton, Cynthia E. "Public Spaces for the Discussion of Peru's Recent Past." *Antipoda* 5 (2007): 143-68.

Mink, George. "Institutions of National Memory in Post-Communist Europe: From Transitional Justice to Political Use of Biographies (1989-2010)." In *History, Memory and Politics in Central and Eastern Europe Memory Games*, 155-170. New York: Palgrave Macmillan, 2013.

Minow, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press, 1998.

Minow, Martha. *Breaking the cycles of hatred: memory, law, and repair*. Princeton, N.J.: Princeton University Press, 2002.

Misztal, Barbara. *Theories of Social Remembering*. Philadelphia: Open University Press, 2003.

Mowbray, Alastair, R. *Cases and materials on the European Convention on Human Rights*. Oxford: Oxford University Press, 2007.

Mowbray, Alastair, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford; Portland: Hart Publishing, 2004.

Nachman, Ben-Yehuda. *The Masada myth: collective memory and mythmaking in Israel*. Madison: University of Wisconsin Press, 1995.

Naidu, Ereshnee. "Memory Beyond Transitions: The Role of Memory in Long-Term Social Reconstruction." *International Journal of Transitional Justice* 6, 1:161-171.

Naqvi, Yasmin. "The right to the truth in international law: fact or fiction?" *International Review of the Red Cross* 88, no. 862 (2006): 245-273.

Nartowski, Andrzej. "The UNESCO system of protection of the right to education." *Polish Yearbook of International Law* 6 (1974): 289-309.

Nietzsche, Friedrich Wilhelm. *Untimely meditations : Friedrich Nietzsche*. Edited by Daniel Breazeale. Translated by Reginald J. Hollingdale. Cambridge: Cambridge University Press, 1997.

Nino, Carlos Santiago. *Radical Evil on Trial*. New Haven, CT: Yale University Press, 1996.

Nolte, Georg. "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations." *European Journal of International Law* 13, no. 5 (2002): 1083-1098.

Nora, Pierre, Chandernagor Françoise. *Liberté pour l'histoire*. Paris: CNRS Editions, 2008.

Nora, Pierre. "Between Memory and History: Les Lieux de Mémoire". *Representations* 26 (Spring, 1989): 7-24

Nora, Pierre. "From lieux de mémoire to realms of memory." In *Realms of Memory: Rethinking the French Past. Conflicts and Divisions*, XV-XXIV. English language edition edited by Lawrence D. Kritzman. Translated by Arthur Goldhammer. New York: Columbia University Press, 1998.

Nora, Pierre. "History, Memory and the Law in France, 1990–2010." *Historein* 11 (2011): 10-13.

Nowak, Manfred. "The Right of Victims of Gross Human Rights Violations to Reparation." In Coomans, *Rendering Justice to the Vulnerable*, 203–224.

Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR commentary*. 2nd rev. ed. Kehl, Germany: N.P. Engel, 2005.

Nozaki, Yoshiko. "Japanese Politics and the History Textbook Controversy, 1945-2001." In *History Education and National Identity in East Asia*, edited Edward Vickers, 275-299. London, Routledge: 2005.

Oberg, Marko D. "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ." *European Journal of International Law* 16, no.5 (2005) : 879-906.

Offe, Claus. *Varieties of Transition. The East European and East German Experience*. Cambridge: Cambridge Polity Press, 1996.

Olick, Jeffrey K. "From Collective Memory to the Sociology of Mnemonic Practices and Products." In *Cultural Memory Studies: An International and Interdisciplinary Handbook*, edited by Astrid Erll, Ansgar Nünning, and Sara B Young, 151-162. Berlin; New York: Walter de Gruyter, 2008.

Olick, Jeffrey K. "From Usable Pasts to the Return of the Repressed." *The Hedgehog Review* 9, no. 2 (2007): 19-31.

Olick, Jeffrey K., Robbins, Joyce. "Social memory studies: From 'collective memory' to the historical sociology of mnemonic practices." *Annual Review of sociology* 24 (1998):105-140.

Olick, Jeffrey K., Vinitzky-Seroussi, Vered and Levy, Daniel, eds. *The Collective Memory Reader*. New York: Oxford University Press, 2011.

Open Society Justice Initiative, Commonwealth Human Rights Initiative, Open Democracy Advice Centre, and South African History Archive. *Amicus Curiae. Submission in the Case of Gomes Lund and Others v. Brazil. A Submission to the Inter-American Court of Human Rights*. June 2010. Available at:
http://www.right2info.org/resources/publications/briefs/gomes-lund_amicus_eng

Open Society Report. Briefing Paper: "Archives of State Security Service Records." January 2013, available at: <http://www.right2info.org/resources/publications>

Orentlicher, Diane, F. "Settling accounts revisited: Reconciling Global Norms with Local Agency." *International Journal of Transitional Justice* 1, no. 1 (2007): 10-22.

Orentlicher, Diane.F. "Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime." In *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, edited by Neil, J. Kritz, 375-416. Washington, D.C.: United States Institute of Peace Press (2004).

Orwell, George. *Nineteen eighty-four*. Edited by Peter Davison. London: Secker & Warburg, 1987 .

O'Shea, Andreas. *Amnesty for Crime in International Law and Practice*. The Hague: Kluwer Law International, 2002.

Osiel, Mark J. "Ever Again: Legal Remembrance of Administrative Massacre." *University of Pennsylvania Law Review* 144, no. 2 (1995): 463–704.

Osiel, Mark J. *Mass Atrocity, Collective Memory, and the Law*. New Brunswick, N.J: Transaction, 1997.

Páez, Dario, Basabe, Nekane, Jose Luis González. "Social Processes and Collective Memory: a cross-cultural approach to remembering political events." In *Collective Memory of Political Events*, edited by James W. Pennebaker, Dario Paez, Bernard Rimé, 147–174. Mahwah, N.J. : Lawrence Erlbaum Associates, 1997.

Pasqualucci, Jo, M. "The whole truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System." *Boston University International Journal* 12 (1994): 321-340.

Pasqualucci, Jo. M. *The Practice and Procedure of the Inter-American Court of Human Rights*. 2nd ed. New York: Cambridge University Press, 2013.

Passerini, Luisa. *Fascism in popular memory: The cultural experience of the Turin working class*. Cambridge: Cambridge University Press, 1987.

Pech, Laura. "The Law of Holocaust Denial in Europe: Towards a Qualified EU-Wide Criminal Prohibition." Jean Monnet Working Paper 10/09. *The Jean Monnet Working Paper Series*. New York: NYU School of Law, 2019.

Petersen, Trudy H. *Final acts: a guide to preserving the records of Truth Commissions*. Washington D.C.: Woodrow Wilson Center Press: 2005.

Pethes, Nicolas, and Ruchatz, Jens. *Dizionario della Memoria e Del Ricordo*. Milano: Bruno Mondadori, 2005.

Pisillo Mazzeschi, Riccardo. "Sulla Natura degli Obblighi Internazionali di Tutela dei Diritti Economici, Sociali e Culturali." In Venturini e Baratti, *Diritti Individuali e Giustizia Internazionale*, 715-733.

Plato. *The collected dialogues of Plato including the letters*. Edited by Edith Hamilton, and Huntington, Cairns. Princeton: Princeton University Press, 1961.

Pope John Paul II. *Memory and Identity: Conversations at the Dawn of a Millennium*. New York: Rizzoli, 2005.

Portelli, Alessandro. "The peculiarities of oral history", *History Workshop Journal* 12, no.1 (1981): 96-107.

Pouyat Alice. "Génocide arménien: la loi contestée." *L'Express*, October 13, 2006. Available at: http://www.lexpress.fr/actualite/politique/genocide-armenien-la-loi-contestee_460645.html

Pugiotto, Andrea. "Quando (e perché) la memoria si fa legge." *Quaderni costituzionali* 1 (2009): 7-36.

Randelzhofer, Albrecht, Tomuschat, Christian, eds. *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*. The Hague; Boston: Nijhoff 1999.

Reading, Anna. "Identity, Memory and Cosmopolitanism The otherness of the past and a right to memory?" *European Journal of Cultural Studies* 14, No. 4 (2011): 379–394.

Reading, Anna. "Memory and Identity." *European Journal of Cultural Studies* 14, no.4 (2011) 377-378.

Resta, Giorgio, and Zeno-Zencovich, Vincenzo. "La storia 'giuridificata'." In *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, 11-41.

Resta, Giorgio, and Zeno-Zencovich, Vincenzo. *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*. Napoli: Editoriale Scientifica, 2012.

Rettig, Max. "Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?" *African Studies Review* 51, no. 3 (2008): 25-50.

Ricoeur, Paul. *La mémoire, l'histoire, l'oublie*. Seuil : Poche Essais, 2000.

Ricoeur, Paul. *Time and Narrative*, vol. 3. Chicago: University of Chicago Press, 1984.

Rieff, David. "The Bureaucrat of Torture." *World Policy Journal* 19, no. 1 (2002): 105-110.

Ritchie, Donald A. *The Oxford handbook of oral history*. Oxford; New York: Oxford University Press, 2011.

Robertson, Geoffrey. *Crimes against humanity : the struggle for global justice*. London: Penguin Books, 2012.

Rodotà, Stefano. "Il Diritto Alla Verità." In Resta and Zencovic, *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, 497 – 515.

Roht-Arriaza, Naomi, Orlovsky, K. "A complementary relationship: Reparations and development." In *Transitional justice and development: making connections*. Edited by Pablo De Greiff, and Roger Duthie, 170-213. New York: Social Science Research Council, 2009.

Roht-Arriaza, Naomi. "State responsibility to investigate and prosecute grave human rights violations in international law." *California Law Review* 78, no. 2 (1990): 451-513.

Roht-Arriaza, Naomi. "The new landscape of transitional justice." In *Transitional justice in the twenty-first century: beyond truth versus justice*, edited by Naomi Roht-Arriaza and Javier Mariezcurrena, 1-16. Cambridge, UK; New York: Cambridge University Press, 2006.

Roht-Arriaza, Naomi. *Impunity and Human Rights in International Law and Practice*. Oxford: Oxford University Press, 1995.

Rombouts, Heidy, Sardaro, Pietro, and Vandeginste, Stef. "The Right to reparation for Victims of Gross and Systematic Violations of Human Rights." In Feyter ed al, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, 345-498.

Rosenberg, Sheri P. "What's Law Got To Do With It?: The Bosnia V. Serbia Decision's Impact On Reconciliation." *Rutgers Law Review* 61, no.1 (2008): 101-126.

Rosenfeld, Friederich. "Collective Reparations for victims of armed conflicts." *International Review of the Red Cross* 92, no. 879 (2010): 731-746.

Rosoux, Valerie. "Human rights and the 'work of memory' in international relations." *Journal of Human Rights* 3, no. 2 (2004): 159-170.

Rossington, Michael, Whitehead, Anne, eds. *Theories of memory: a reader*. Baltimore: Johns Hopkins University Press, 2007.

Rotberg, Robert, Thompson, Dennis, eds. *Truth versus Justice. The morality of Truth commissions*. Princeton, N.J.: Princeton University Press, 2000.

Rousso, Henrie. *The Vichy Syndrome: History and Memory in France since 1944*. Translated by Arthur Goldhammer. Cambridge: Harvard University Press, 1991.

Rubio Marín, Ruth, ed. *The Gender of Reparations: unsettling sexual hierarchies while redressing human rights violations*. New York: Cambridge University Press, 2009.

Rubio Marín, Ruth. "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression." In Rubio Marín, *The Gender of Reparations*, 381-402.

Santayana, George. "Reason in Common Sense." In *The birth of reason & other essays*. Edited by Daniel Cory. New York: Columbia University Press, 1995.

Sarkin, Jeremy. "The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the Gacaga Courts in dealing with the genocide." *Journal of African Law* 45, no. 2 (2001): 143-172.

Savelsberg Joachim J., King, Ryan D. "Law and Collective Memory." *Annual Review of Law and Social Science* 3 (2007): 189-211.

Savelsberg Joachim J., King, Ryan D. *American Memories. Atrocities and the Law*. New York: Russel Sage Foundation, 2011.

Schabas, William. "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone." *Human Rights Quarterly* 25, no. 4, (2003): 1035-1066.

Schauer, Frederick. "Social Epistemology, Holocaust Denial and the Post-Millian Calculus." In Herz and Molnar, *The Content and Context of Hate Speech*, 129-143.

Schauer, Frederick. "The Exceptional First Amendment." In *American Exceptionalism and Human Rights*, edited by Michael Ignatieff, 29-56. Princeton: Princeton University Press, 2005.

Schmidt, Markus G., Vojtovic, Raphaële L. "Holocaust denial and freedom of expression." In *The jurisprudence of human rights law: a comparative interpretive approach*, edited by Theodore S. Orlin, Allan Rosas and Martin Scheinin, 133-158. Turku, Finland: Institute for Human Rights, Åbo Akademi University 2000.

Schneider, Nina. "Breaking the 'Silence' of the Military Regime: New Politics of Memory in Brazil". *Bulletin of Latin American Research* 30, no.2 (2011): 198–212.

Schotsman, Martien. "Victim's Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations", in Feyter, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, 105 – 133.

Schudson, Michael. "The Past in the Present versus the Present in the Past." *Communication II* (1989): 105-113.

Schwartz, Barry. "The Social Context Of Commemoration: A Study On Collective Memory." *Social Forces* 61, no. 2 (1982): 374-402.

Schwartz, Paul. "The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination." *The American Journal of Comparative Law* 37, No. 4 (1989): 675-701.

Seibert-Fohr, Anja. *Prosecuting Serious Human Rights Violations*. Oxford; New York: Oxford University Press, 2009.

Shaw, Rosalind. "Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone." *The International Journal of Transitional Justice*, 1, no.2 (2007): 183–207.

Shelton, Dinah, ed. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.

Shelton, Dinah. "Righting Wrongs: Reparations in the Articles on State Responsibility." *American Journal of International Law* 96 (2002): 833-856.

Shelton, Dinah. "Soft Law." In *Routledge Handbook of International Law*. Edited by David Armstrong, 61-80. London; New York: Routledge, 2009.

Shelton, Dinah. "The Jurisprudence of the Inter-American Court of Human Rights." *American University International Law Review* 10, no. 1 (1996): 333-372.

Shelton, Dinah. "The World of Atonement: Reparations for Historical Injustices." *Netherlands International Law Review* 50, no.3 (2003): 289-325.

Shelton, Dinah. *Remedies in International Human Rights Law*. 2nd ed. Oxford; New York: Oxford University Press, 2005.

Shim, Younf-Hee. "From Silence to Testimony: The Role of Legal Institutions in the Restoration of the Collective Memories of Korean 'Comfort Women'." In Karstedt, *Legal Institutions and Collective Memory*, 135-157.

Shue, Henry. *Basic rights: Subsistence, affluence, and U.S. foreign policy*. (New Jersey: Princeton University Press, 1980.

Simons, Marlise. "Chirac Affirms France's Guilt In Fate of Jews." *The New York Times*. July 17, 1995. Available at: <http://www.nytimes.com/>.

Spiga, Valentina, "No Redress without Justice. Victims and International Criminal Law." *Journal of International Criminal Justice* 10, No. 5 (2012): 1377-1394.

Spiga, Valentina. "The right to justice for victims of human rights crimes." Ph.D. thesis, European University Institute, 2014.

Spring, Kimberley. "Judging War, Judging History: Behind Truth and Reconciliation." *Memory Studies* 5, no. 3 (2012): 343-345.

Stan, Lavinia, Nedelsky, Nadya, eds. *Encyclopedia of Transitional Justice*, vol. 1. New York: Cambridge University Press, 2013.

Stan, Lavinia. "The Politics of Memory in Post-Communist Europe: A Comparative Analysis." Paper presented at the international symposium: "Expériences et mémoire. Partager en français la diversité du monde. Colloquium." Bucharest, 2006.

Stan, Lavinia. "Truth Commissions in Post-Communism: The Overlooked Solution?" *The Open Political Science Journal* 2 (2009): 1-13.

Stan, Lavinia. *Transitional justice in post-communist Romania. The politics of memory*. New York: Cambridge University Press, 2013.

Stover, Eric, Weinstein, Harvey M. *My Neighbor, My Enemy*. New York: Cambridge University Press, 2004.

Sullivan, Kathleen, Gunther, Gerald. *Constitutional Law*. 14th ed. New York: Foundation Press, 2001.

Sullo, Pietro. "Lois Mémoires in Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny." *Leiden Journal of International Law* 27, no. 2 (2014): 419-445.

Tamarit Sumalla, Josep M. *Historical memory and criminal justice in Spain: a case of late transitional justice*. Cambridge: Intersentia, 2013.

Teitel, Ruti. *Transitional Justice*. Oxford; New York: Oxford University Press, 2000.

Thomson, Alistair. "Four paradigm transformations in oral history". *The Oral History Review* 34, no.1 (2006): 49-70.

Thucydides. *The History of the Peloponnesian War*. In *Thucydides translated into English*, translated by Jowett, Benjamin. Oxford: Clarendon Press. 1881, Volume 1.

Todorov, Tzvetan. *Mémoire du Mal, tentation du Bien: enquête sur le siècle*. Paris: Robert Laffont, 2000.

Todorov, Tzvetan. *Memory as a Remedy for Evil*. London: Seagull Books, 2010.

Tomuschat, Christian. "Darfur—Compensation for the Victims." *Journal of International Criminal Justice* 3, no. 3 (2005): 579-589.

Tomuschat, Christian. "Individual reparation claims in instances of gross violations of human rights." In Randelzhofer and Tomuschat, *State responsibility and the individual: reparation in instances of grave violations of human rights*, 1-26

Tomuschat, Christian. *Reparation for Victims of Grave Human Rights Violations*. Tulane Journal of International and Comparative Law 10 (2002): 157-184.

Tonkin, Elizabeth. *Narrating our pasts : the social construction of oral history*. Cambridge; New York: Cambridge University Press, 1992.

Tulkens, Françoise. "When to say is to do. Freedom of expression and hate speech in the case-law of the European Court of Human Rights." Paper presented at the Expert Seminar on Human Rights for European Judicial Trainers. September 3, 2013.

Van Boven, Theo. "Victims' Right to a Remedy and Reparation: the New United Nations Principles and Guidelines". In Ferstman, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 19-40.

Van Houtte, Hans, Das, Hans, Delmartino, Bart. "The United Nations Compensation Commission." In De Greiff, *The Handbook of Reparations*, 322-378.

Varat, Jonathan. "Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship", *UCLA Law Review* 53, no. 5 (2006): 1107-1141.

Vargas Llosa, Mario. "El Ojo que llora". *Diario El Pais*, 14 January 2007. Available at: <http://elpais.com/diario>

Venturini, Gabriella, Bariatti Stefania, eds. *Diritti Individuali e Giustizia Internazionale. Liber Fausto Pocar*. Milano: Giuffrè, 2009.

Vidal-Naquet, Pierre. *Les assassins de la mémoire : "Un Eichmann de papier" et autres essais sur le révisionnisme*. First published 1930. Paris: Découverte, 2005.

Wannamaker, Annette. "'Memory Also Makes a Chain': The Performance of Absence in Griselda Gambaro's 'Antigona Furiosa'." *The Journal of the Midwest Modern Language Association* 33, no.3; 34, no.1 (Autumn, 2000 - Winter, 2001): 73-85.

Weeramantry, Christopher G. "Access to information: a new human right. The right to know." *Asian Yearbook of International Law* 4 (1994): 99-125 .

Weinstein, James. "An Overview of American Free Speech Doctrine and its Application to Extreme Speech." In Hare and Weinstein, *Extreme Speech and Democracy*, 82-95.

White, Elizabeth B. "History in Courthouse: The Presentation of World War II Crimes in U.S. Courts Sixty Years Later." In *Nazi crimes and the law*, edited by Nathan Stoltzfus and Henry Friedlander, 173-195. Washington, D.C.: German Historical Institute; Cambridge; New York, Cambridge University Press. 2008.

Wieselhaus-Brahm, Eric. *Truth commissions and transitional societies: the impact on human rights and democracy*. London-New York: Routledge, 2010.

Wieviorka, Annette. "Entre transparence et oubli." In *Devoir de mémoire, droit à l'oubli?* Edited by Thomas Ferenczi, 177-183. Bruxelles: Editions Complexe, 2002.

Wilson, Richard A. *Writing history in international criminal trials*. New York: Cambridge University Press, 2011.

Winter, James. *Sites of Memory, sites of Mourning: The Great War in European Cultural History*. Cambridge: Cambridge University Press, 1995.

Winter, Jay. "The Generation of Memory: Reflections on the 'Memory Boom'." *Contemporary Historical Studies, Archives & Social Studies: A Journal of Interdisciplinary Research* 1, no. 0 (2007): 363-397.

Wittgenstein, Ludwig. *Philosophical grammar*. Edited by Rush Rhees. Translated by Anthony Kenny. First Published 1974. Berkeley: University of California Press, 2005.

Wolpert, Andrew. *Remembering Defeat. Civil War and Civic Memory in Ancient Athens*. Baltimore; London: The Johns Hopkins University Press, 2002.

Wyschogrod, Edith. *An Ethics of Remembering: History, Heterology, and the Nameless Others*. Chicago: University of Chicago Press, 1998.

Xenos, Dimitris. *The positive obligations of the state under the European Convention of Human Rights*. London: Routledge, 2011.

Yates, Frances Amelia. *The Art of Memory*. Chicago: University of Chicago Press, 1966.

International and Regional Instruments

International and Regional Conventions and Treaties

CoE, *Convention on Access to Official Documents*, CETS 205, 18th June 2009, available at <http://conventions.coe.int>

CoE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* [ECHR], 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

CoE, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, available at: <http://www.refworld.org/docid/3ae6b38317.html>

CoE, *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, 28 January 2003, available at: <http://www.refworld.org/docid/47fdfb20f.html>

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>

Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], 18 December 1979. UN Doc. A/RES/34/180, available at: <http://www.refworld.org/docid/3b00f2244.html>

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948. United Nations, Treaty Series, vol. 78, p. 277, available at: <http://www.refworld.org/docid/3ae6b3ac0.html>

Convention on the Rights of the Child, 20 November 1989. United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

Declaration on the Elimination of All Forms of Racial Discrimination, 20 November 1963. UN. Doc. A/RES/1904, available at: <http://www.refworld.org/docid/3b00f06558.html>

Declaration on the Elimination of Discrimination against Women, 7 November 1967. UN. Doc. A/RES/2263(XXII), available at: <http://www.refworld.org/docid/3b00f05938.html>

Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992. UN. Doc. E/CN.4/RES/1992/29, available at: <http://www.refworld.org/docid/3b00f0b270.html>

Durban Declaration and Plan of Action, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001, available at: <http://www.refworld.org/docid/3db573314.html>, endorsed by the UN GA Resolution 56/266 of 15 May 2002

EU, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>

Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (First Geneva Convention), 12 August 1949, 75 UNTS 31.

Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

Geneva Convention Relative to Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.

ILO, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169, available at: <http://www.refworld.org/docid/3ddb6d514.html>

Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, available at: <http://www.refworld.org/docid/3ae6b38ef.html>

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, available at: <http://www.refworld.org/docid/47fdfaeb0.html>

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html>

International Covenant on Civil and Political Rights [ICCPR], 16 December 1966. United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

International Covenant on Economic, Social and Cultural Rights [ICESCR], 16 December 1966. United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>

OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), 16 November 1999, A-52, available at: <http://www.refworld.org/docid/3ae6b3b90.html>

OAS, *American Convention on Human Rights, "Pact of San Jose"* [ACHR], Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html>

OAS, *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: <http://www.refworld.org/docid/3ae6b3710.html>

OAU, *African Charter on Human and Peoples' Rights* ("Banjul Charter") [ACHPR], 27 June 1981. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html>

OAU, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <http://www.refworld.org/docid/3f4b139d4.html>

UNESCO, *Brisbane Declaration*, 3 May 2010, available at: <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/brisbane-declaration>

United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007. UN. Doc. A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>

Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983, available at: <http://www.refworld.org/docid/3ae6b3961c.html>

International and Regional Documents

UN Documents

CERD, General recommendation No. 35: Combating racist hate speech, 26 September 2013. UN. Doc. CERD/C/GC/35

CESCR, Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights on Georgia, 9 May 2000. UN Doc. E/C.12/1/Add.42 (2000)

CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999. UN. Doc. E/C.12/1999/10, available at: <http://www.refworld.org/docid/4538838c22.html>

CHR, Human Rights Resolution 2005/66: Right to the Truth, 20 April 2005. UN. Doc. E/CN.4/RES/2005/66, available at: <http://www.refworld.org/docid/45377c7d0.html>

CHR, Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum: Updated set of principles for the protection and promotion of human rights through action to combat impunity. UN Doc. E/CN.4/2005/102/Add.1, 18 February 2005, available at: <http://www.refworld.org/docid/42d66e7a0.html>

CHR, Report of the Special Rapporteur Mr. Bacre Waly Ndiaye on Extrajudicial, summary or arbitrary executions, 7 December 1993. UN. Doc. E/CN.4/1994/7, available at: <http://www.refworld.org/docid/54119/1994.html>

CHR, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and Expression, 28 January 1998. UN. Doc. E/CN.4/1998/40, available at: <http://www.refworld.org/docid/3b00f41b0.html>

CHR, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 18 January 2000. UN Doc. E/CN.4/2000/63

CHR, Report of the Special Rapporteur on the right to freedom of opinion and expression, 17 December 2004. UN Doc. E/CN.4/2005/64

CHR, Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights, 8 February 2006. UN. Doc. E/CN.4/2006/91, available at: <http://www.refworld.org/docid/46822b6c2.html>

CHR, Sub-Commission on the Promotion and Protection of Human Rights, Revised Final report prepared by Mr. Joinet on the question of the impunity of perpetrators of human rights violations (civil and political), 2 October 1997. UN. Doc. E/CN.4/Sub.2/1997/20/Rev.1, available at: <http://www.refworld.org/pdfid/3b00f4298.pdf>

CHR, Sub-Commission on the Promotion and Protection of Human Rights, Resolution: Compensation for Victims of Gross Violations of Human Rights 1989/13, 31 August 1989. UN. Doc. E/CN.4/Sub.2/1989/58 E/CN.4/1990/2

ESC, Report of the United Nations High Commissioner for Human Rights, 25 June 2007. UN. Doc. E/2007/82

HRC, Analytical study on human rights and transitional justice, 6 August 2009. UN. Doc. A/HRC/12/18, available at: <http://www.unhcr.org/refworld/docid/4a9d1be40.html>

HRC, General Comment No. 20: Article 7, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 March 1992, HRI/GEN/1/Rev.6, available at: <http://www.refworld.org/docid/453883fb0.html>

HRC, General Comment No. 29: Article 4, Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.refworld.org/docid/453883fd1f.html>

HRC, General comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.refworld.org/docid/478b26ae2.html>

HRC, General comment No. 34: Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, available at: <http://www.refworld.org/docid/4ed34b562.html>

HRCouncil, Report of the Office of the High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth, 14 April 2011. UN. Doc. A/HRC/17/21

HRCouncil, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 28 August 2013. UN. Doc. A/HRC/24/42

HRCouncil, Resolution 12/12: Right to the Truth, 25 September 2009. UN. Doc. A/HRC/12/L.27

HRCouncil, Resolution 21/4 :Enforced or Involuntary Disappearances, 27 September 2012. UN. Doc. A/HRC/RES/21/2

HRCouncil, Resolution 21/7: Right to the Truth, 10 October 2012. UN. Doc. A/HRC/RES/21/7, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/7

HRCouncil, Resolution 9/11: Right to the Truth, 18 September 2008. UN. Doc. A/HRC/RES/9/11.

HRCouncil, Right to the Truth: Report of the Office of the High Commissioner for Human Rights, 7 June 2007. UN. Doc. A/HRC/5/7, available at: <http://www.refworld.org/docid/46822ce22.html>

HRCouncil, Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights, 21 August 2009. UN. Doc. A/HRC/12/19, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf>

OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), 2004, UN. Doc. HR/P/PT/8/Rev.1, available at: <http://www.refworld.org/docid/4638aca62.html>

OHCHR, Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice. 2009. HR/PUB/09/2, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

UN DoPA, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ("Minnesota Protocol"). UN. Doc. E/ST/CSDHA/.12 (1991). Annex I, available at: <http://www.unrol.org/doc.aspx?d=2757>

UN GA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [Basic Principles on Reparations]: resolution adopted by the General Assembly, 21 March 2006. UN. Doc. A/RES/60/147, available at: <http://www.refworld.org/docid/4721cb942.html>

UN GA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. 29 November 1985, UN. Doc. A/RES/40/34, available at: <http://www.refworld.org/docid/3b00f2275b.html>

UN GA, Note by the Secretary General: Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 8 October 2014. UN. Doc. A/69/518

UN GA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 7 September 2012. UN. Doc. A/67/357

UN GA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 4 September 2013. UN. Doc. A/68/362

UN GA, Resolution on Holocaust Denial, 26 January 2007. UN. Doc. A/RES/61/255, available at: <http://www.un.org/en/holocaustremembrance/docs/res61.shtml>

UN GA, Resolution on the Commemoration of the sixtieth anniversary of the end of the Second World War, 5 May 2005, UN. Doc. A/RES/59/26.

UN GA, Resolution on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001. UN. Doc. A/56/83.

UN SC, Resolution 687/1991, 8 April 1991. UN. Doc. S/RES/687 (1991), available at: <http://www.un.org/Docs/scres/1991/scres91.htm>

UN SC, Resolution 827, 25 May 1993. UN. Doc. S/RES/827 (1993), art. 2, available at: <http://www.refworld.org/docid/3b00f21b1c.html>

UN SC, Resolution 955, 8 November 1994. UN. Doc. S/RES/955 (1994), available at: <http://www.refworld.org/docid/3b00f2742c.html>

UN, OSCE, OAS Special Rapporteurs Joint declaration on freedom of expression. 6 December 2004, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1>

UNESCO, Recommendation Concerning the Status of Higher-Education Teaching Personnel , 11 November 1997, available at: <http://portal.unesco.org/en/ev>

WG EID, General Comment on the Right to the Truth in Relation to Enforced Disappearances, available at: http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

WG EID, Report of the Working Group on Enforced or Involuntary Disappearances, 12 January 1998. UN Doc. E/CN.4/1998/43

WG EID, Report of the Working Group on Enforced or Involuntary Disappearance. Mission to Argentina. 5 January 2009. UN. Doc. A/HRC/10/9/Add

WG EID, Report of the Working Group on Enforced or Involuntary Disappearances, 28 January 2013. UN Doc. A/HRC/22/45

COE

CoE, Committee of Ministers, *Recommendation on a European policy on access to archives*, Rec(2000)13, 13 July 2000.

CoE, Committee of Ministers, *Recommendation on Access to Official Documents*, Rec(2002)2, 21 February 2002.

CoE, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011, VI, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1769177>

PACE, *Resolution 1463(2005): Enforced disappearances*, 3 October 2005.

PACE, *Resolution 1954(2013): National security and access to information*, 2 October 2013.

PACE, *Resolution 2024(2013): National security and access to information*, 2 October 2013.

OAS

IACommHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 30 December 2004. OEA/Ser.L/V/II.222. Doc.5, rev. 23 February 2005

IACommHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 30 December 2009. OEA/Ser.L/V/II.Doc.51

IACommHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 31 December 2013, OEA /Ser.L/V/II.149.Doc.50

IACommHR, *Inter-American Declaration of Principles on Freedom of Expression*, 19 October 2000, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&IID=1>

IACommHR, Office of the Special Rapporteur for Freedom of Expression. *El derecho de acceso a la información pública en las Américas: Estándares interamericanos y comparación de marcos legales*. 30 December 2012. OEA/Ser.L/V/II CIDH/RELE/INF.7/12

IACommHR, Office of the Special Rapporteur for Freedom of Expression, *Report on Paraguay*. 2001

IACommHR, Office of the Special Rapporteur for Freedom of Expression, *Report on Panama*, 2003

IACommHR, Office of the Special Rapporteur for Freedom of Expression, *The Inter-American Legal Framework regarding the right to access to Information*, 30 December 2009. OEA/Ser.L/V/II CIDH/RELE/INF. 1/09, available at: <http://www.cidh.org/relatoria/29-34>

IACommHR, Office of the Special Rapporteur for Freedom of Expression. *El derecho de acceso a la información pública en las Américas: Estándares interamericanos y comparación de marcos legales*. OEA/Ser.L/V/II CIDH/RELE/INF.7/12, 30 December 2012.

IACommHR, Office of the Special Rapporteur for Freedom of Expression. *Estudio Especial sobre el Derecho de Acceso a la Información*. August, 2007.

IACommHR, *Third Report on the Situation of Human Rights in Paraguay*, 9 March 2001. OEA/Ser.L/V/II,110, n°52, Ch.III.

OAS GA, *Resolution: Access to Public Information: Strengthening Democracy*, 4 June 2009. AG/Res. 2514 (XXXIX-O/09).

OAS GA, *Resolution: Model Inter-American Law on Access to Public Information*, 8 June 2010. AG/Res. 2607 (XL-O/10).

OAS GA, *Resolution: Right to Freedom of Thought and Expression and the Importance of the Media*, 11 July 2005. AG/Res. 2149 (XXXV-O/05).

OAS GA, *Resolution: Right to the Truth*, 12 July 2010. AG/Res. 2595 (XL-O/10).

OAS GA, *Resolution: Right to the Truth*, 3 June 2008. AG/Res. 2406 (XXXVIII-O/08).

OAS GA, *Resolution: Right to the Truth*, 5 June 2007. AG/Res. 2267 (XXXVII-O/07).

OAS GA, *Resolution: Right to the Truth*, 6 June 2006. AG/Res. 2175 (XXXVI-O/06).

OAU

ACommHPR, *Declaration of Principles on Freedom of Expression in Africa*, 22 October 2002, available at: <http://www.refworld.org/docid/4753d3a40.html>

ACommHPR, *Model Law on Access to Information for Africa*, 12 April 2013, available at http://www.achpr.org/files/news/2013/04/d84/model_law.pdf

Miscellaneous

Council of the European Union, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*. O.J. L 328/55, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008F0913>

ICA – Human Rights Working Group, *Basic Principles of the Role of Archivists in Support of Human Rights*. June 2014, available at: <http://www.ica.org/>

ILA, *Conference Report on Reparation for Victims of Armed Conflict*. Washington, 7-11 April 2014, available at: <http://www.ila-hq.org>

ILA, *Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*. Hague Conference, Resolution No 2/2010. 20 August 2010, available at: <http://www.ila-hq.org>

ILA, *Resolution of International Law Principles on Reparation for Victims of Armed Conflict (Procedural Issues)*. Washington Conference, Resolution 1/2014. 11 April 2014, available at: <http://www.ila-hq.org>

ILC, *Report of the International Law Commission on the work of its forty-fifth session* (3 May -23 July 1993). Official Records of the General Assembly, Forty-eighth session, Supplement no. 10. *Yearbook of the International Law Commission II*, no. 2 (1993).

ILC, *Report of the study group on the fragmentation of international law*: “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. UN Doc. A/59/10, Chap. X (2004).

ILC, *Report of the study group on the fragmentation of international law*: “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. UN Doc. A/60/10, Chap. XI (2005).

ILC, *Report of the study group on the fragmentation of international law*: “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”. UN Doc. A/61/10, Chap. XII (2006).

ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://www.refworld.org/docid/3ddb8f804.html>

International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*, 2006, Practitioners Guide No. 2, available at: <http://www.refworld.org/docid/4a7838b42.html>

International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice*. Chicago: The International Human Rights Law Institute, 2008.

Cases

ECtHR and ECommHR

ECtHR [GC], *Beyeler v. Italy*, App. No. 33202/96. Judgment of 5 January 2000

ECtHR [GC], *Çakıcı v. Turkey*, App. No. 23657/94. Judgment of 8 July 1999

ECtHR [GC], *Kononov v. Latvia*, App. No. 36376/04. Judgment of 17 May 2010

ECtHR [GC], *Nachova and Others v. Bulgaria*, App. No. 43577/98. Judgment of 06 July 2005

ECtHR [GC], *Ramsahai v. The Netherlands*, App. No. 52391/99. Judgment of 15 May 2007

ECtHR [GC], *Salaman v. Turkey*, App. No. 21986/93. Judgment of 27 June 2000

ECtHR [GC], *Stoll c. Suisse*, App. No. 69698/01. Judgment of 10 December 2007

ECtHR [GC], *Varnava and others v. Turkey*, App. Nos. 16064/90 et al. Judgment of 18 September 2009

ECtHR [GC], *Öneryildiz v. Turkey*, App. No. 28883/95. Judgment of 30 November 2004

ECtHR, *Airey v. Ireland*, App. No. 6289/73. Judgment of 9 October 1979

ECtHR, *Aksoy v. Turkey*, App. No. 21987/93. Judgment of 18 December 1996

ECtHR, *Aktas v. Turkey*, App. No. 24351/95. Judgment of 24 April 2003

ECtHR, *Altuğ Taner Akçam v. Turkey*, App. No. 27520/07. Judgment of 25 October 2011

ECtHR, *Angelova v. Bulgaria*, App. No. 38361/97. Judgment of 13 June 2002

ECtHR, *Assenov and others v. Bulgaria*, App. No. 24760/94. Judgment of 28 October 1998

ECtHR, *Association "21 December 1989" and Others v. Romania*, App. No. 33810/07. Judgment of 25 May 2011

ECtHR, *Ayder and Others v. Turkey*, App. No. 23656/94. Judgment of 8 January 2004

ECtHR, *Aydın v. Turkey*, App. No. 23178/94. Judgment of 25 September 1997

ECtHR, *Bazorkina v. Russia*, App. No. 69481/01. Judgment of 27 July 2006

ECtHR, *Bingöl v. Turkey*, App. No. 36141/04. Judgment of 22 September 2010

ECtHR, *Braun v. Poland*, App. No. 30162/10. Judgment of 4 November 2014

ECtHR, *C.N. v. United Kingdom*, App. No. 4239/08. Judgment of 13 November 2012

ECtHR, *Campbell and Cosans v. United Kingdom*, App. Nos. 7511/76 7743/76. Judgment of 20 February 1982

ECtHR, *Case Of Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. Nos. 5095/71 5920/72 5926/72. Judgment of 7 December 1976

ECtHR, *Chauvy And Others v. France*, App. No. 64915/01. Judgment of 29 June 2004

ECtHR, *Cox v. Turkey*, App. No. 2933/03. Judgment of 20 May 2010

ECtHR, *Cyprus v. Turkey*, App. No. 25781/94. Judgment of 10 May 2001

ECtHR, *Ergi v. Turkey*, App. No. 23818/94. Judgment of 28 July 1998

ECtHR, *Fáber v. Hungary*. App. No. 40721/08. Judgment of 24 July 2012

ECtHR, *Fatullayev v. Azerbaijan*, App. No. 40984/07. Judgment of 22 April 2010

ECtHR, *Feldek V. Slovakia*, App. No. 29032/95. Judgment of 12 July 2001

ECtHR, *Gaskin v. The United Kingdom*, App. No. 10454/83. Judgment of 7 July 1989

ECtHR, *Giniewski v. France*, App. No. 64016/00. Judgment of 31 January 2006

ECtHR, *Gray V. Germany*, App. No. 49278/09. Judgment of 22 May 2014

ECtHR, *Guerra and others v. Italy*, App. No. 14967/89. Judgment of 19 February 1998

ECtHR, *Isayeva and Others v. Russia*, App. No. 57950/00. Judgment of 24 February 2005

ECtHR, *Janowiec and Others v. Russia*, App. Nos. 55508/07 29520/09. Judgment of 21 October 2013

ECtHR, *Joanna Szulc v. Poland*, App. No. 43932/08. Judgment of 13 November 2012

ECtHR, *Karsai v. Hungary*, App. No. 5380/07. Judgment of 1 December 2009

ECtHR, *Kaya v. Turkey*, App. No. 225335/93. Judgment of 28 March 2000

ECtHR, *Kaya v. Turkey*, App. No. 22729/93. Judgment of 19 February 1998

ECtHR, *Kenedi v. Hungary*, App. No. 31475/05. Judgment 26 May 2009

ECtHR, *Kiliç v. Turkey*, App. No. 22492/93. Judgment of 28 March 2000

ECtHR, *Kurt v. Turkey*, App. No. 24276/94. Judgment of 25 May 1998

ECtHR, *Leander v. Sweden*, App. No. 9248/81. Judgment of 26 March 1987

ECtHR, *Lehideux and Isorni v. France*, App. No. 24662/94. Judgment of 23 September 1998

ECtHR, *Leonidis v. Greece*, App. No. 43326/05. Judgment of 8 January 2009

ECtHR, *McCann and others v. The United Kingdom*, App. No. 18984/91. Judgment of 27 September 1995

ECtHR, *McKerr v. United Kingdom*, App. No. 28883/95. Judgment of 4 May 2001

ECtHR, *Monnat v. Switzerland*, App. No. 73604/01. Judgment of 21 September 2006

ECtHR, *Perinçek v. Switzerland*, App. No. 27510/08. Judgment of 17 December 2013

ECtHR, *Rantsev v. Cyprus and Russia*, App. No. 25965/04. Judgment of 7 January 2010

ECtHR, *Sapan v. Turkey*, App. No. 44102/04. Judgment of 8 September 2010

ECtHR, *Sevtap Veznedaroglu v. Turkey*, App. No. 32357/96. Judgment of 11 April 2000

ECtHR, *Sorguç v. Turkey*, App. No. 17089/03. Judgment of 23 June 2009

ECtHR, *Sunday Times v. UK (I)*, App. No. 6538/74. Judgment of 26 April 1979

ECtHR, *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05. Judgment of 14 April 2009

ECtHR, *Ungváry and Irodalom Kft. v. Hungary*, App. No. 64520/10. Judgment of 3 December 2012

ECtHR, *Velikova v. Bulgaria*, App. No. 41488/98. Judgment of 18 May 2000

ECtHR, *Witzsch v. Germany*, App. No. 7485/03. Judgment of 13 December 2005

ECtHR, *Yasa v. Turkey*, App. No. 22495/93, Judgment of 2 September 1998

ECtHR, *Youth Initiative for Human Rights v. Serbia*, App. No. 48135/06. Judgment of 25 June 2013

ECommHR, *X. v. Federal Republic of Germany*. App. No. 9235/81. Decision of 16 July 1982

ECommHR, *Kühnen v. Germany*, App. No. 12194/86. Decision of 12 May 1988
ECommHR, *Honsik v. Austria*, App. No. 25062/94. Decision of 18 October 1995
ECommHR, *Marais v. France*, App. No. 31159/96. Decision of 24 June 1996
ECommHR, *Ochsenberger v. Austria*, App. No. 21318/93. Decision of 2 September 1994
ECommHR, *Walendi v. Germany*, App. No. 21128/92. Decision of 7 January 1993

IACtHR

IACtHR, *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154
IACtHR, *Case of Aloeboetoe et al. v. Suriname*. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15
IACtHR, *Case of Anzualdo-Castro v. Peru*. Preliminary Objection, Merits, Reparations and costs. Judgment of September 22, 2009. Series C No. 202
IACtHR, *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70
IACtHR, *Case of Bámaca Velásquez v. Guatemala*. Reparations and Costs, Judgment of 22 February 2002. Serie C No. 91
IACtHR, *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75
IACtHR, *Case of Blanco Romero et al v. Venezuela*. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138
IACtHR, *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100
IACtHR, *Case of Cantoral Benavides v. Peru*. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88
IACtHR, *Case of Carpio-Nicolle et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of November 22, 2004. Series C No. 117
IACtHR, *Case of Cesti Hurtado v. Peru*. Reparations and Costs. Judgment of May 31, 2001. Series C No. 78
IACtHR, *Case of Chitay Nech v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 May 2010. Series C No. 212
IACtHR, *Case of Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68
IACtHR, *Case of El Amparo v. Venezuela*. Reparations and Costs. Order of the Court of April 16, 1997. Series C No. 46
IACtHR, *Case of Escué-Zapata v. Colombia*. Merits, Reparations and Costs. Judgment of. July 4, 2007. Series C No. 165

IACtHR, *Case of Espinoza Gonzáles v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 289,

IACtHR, *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221

IACtHR, *Case of Godínez Cruz v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5

IACtHR, *Case of Goiborù* Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153

IACtHR, *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219

IACtHR, *Case of González et al. ('Cotton Field') v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205

IACtHR, *Case of Gutiérrez and Family v. Argentina*. Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 271

IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Merits, Reparations and Costs. Judgment of September 12, 2005 Series C No. 132

IACtHR, *Case of Human Rights Defender et al. v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283

IACtHR, *Case of Ibsen Cárdenas and Ibsen-Peña v. Bolivia*. Merits, Reparation and Costs. Judgment of September 1, 2010. Series C No. 217

IACtHR, *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162

IACtHR, *Case of La Rochela*. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 163

IACtHR, *Case of Las Palmeras v. Colombia*. Merits. Judgment of December 6, 2001. Series C No. 90

IACtHR, *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. Series C No. 213

IACtHR, *Case of Maritza Urrutia v. Guatemala*, Judgment on Merits, Reparations and Costs. November 27, 2003- Series C No. 103

IACtHR, *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108

IACtHR, *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209

IACtHR, *Case of Servellón-García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152

IACtHR, *Case of the "Mapiripán Massacre" v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134

IACtHR, *Case of the 'Las Dos Erres' Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211

IACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112

IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63

IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77

IACtHR, *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Preliminary Objections. Judgment of January 25, 1996. Series C No. 23

IACtHR, *Case of the 19 Merchants v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109

IACtHR, *Case of the Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110

IACtHR, *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148

IACtHR, *Case of the Massacres of El Mozote and neighboring locations v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252

IACtHR, *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124

IACtHR, *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116

IACtHR, *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114

IACtHR, *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92

IACtHR, *Case of Vargas-Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155

IACtHR, *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4

IACtHR, *Case of Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7

IACtHR, *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166

IACtHR, *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006. Series C No. 151

IACtHR, *El Caracazo Case*. Reparations and Costs. Judgment of August 29, 2002. Series C No. 95

IACtHR, *Laoyza Tomayo v. Peru*. Reparations and Costs. Judgment of 27 November 1998. Serie C, No. 42

IACtHR, *Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140

IACtHR. *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101

IACommHR

IACommHR, *Lucio Parada Cea et al. v. El Salvador*, Case 10.480, Report N° 1/99; 27 January 1999. OEA/Ser.L/V/II.110, n°52, Ch.III

IACommHR, *Ellacuria y Otros v. El Salvador*, Case 10.488, Report N° 136/99, 22 December 1999. OEA/Ser.L/V/II.106 Doc. 3 rev. at 608 (1999).

IACommHR, *Arnulfo Romero and Galdamez v. El Salvador*, Case 11.481, Report N° 37/00, 13 April 2000, OEA/Ser.L/V/II.106 Doc. 3

HRC (Communications and Reports)

HRC, *Dermit Barbato et al. v. Uruguay*, Comm. No. 84/1981, 21 October 1982. UN. Doc. CCPR/C/OP/2

Abubakar Amirov v. Russian Federation, Comm. No. 1447/2006, 22 Apr 2009. UN. Doc. CCPR/C/95/D/1447/2006

HRC, *Concluding observations of the Human Rights Committee on Brazil*. 1 December 2005. UN. Doc. CCPR/C/BRA/CO/2

HRC, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*. Comm. Nos. 422/1990, 423/1990 and 424/1990. UN Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996)

HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant pursuant to the optional reporting procedure: Uruguay*. 21 December 2012. UN. Doc. CCPR/C/URY/5

HRC, *Bleier v. Uruguay*, Comm. No. R.7/30, 24 March 1980. UN. Doc. Supp. No. 40 (A/37/40)

HRC, *Valenzuela v. Peru*, Comm. No. 309/1988, 14 July 1993. UN. Doc. CCPR/C/48/D/309/1988

HRC, *Comments on El Salvador*, 18 April 1994. UN Doc. CCPR/C/79/Add.34

HRC, *Rodríguez v. Uruguay*, Comm. No. 322/1988, 9 August 1994. UN. Doc. CCPR/C/51/D/322/1988

HRC, *Comments on Tunisia*, 23 November 1994. UN. Doc. CCPR/C/79/Add.43

HRC, *Concluding Observations on Chile*, 30 March 1999. UN. Doc. CCPR/C/79/Add.104

HRC, *Robert W. Gauthier v. Canada*, Comm. No. 633/1995, 5 May 1999. UN. Doc. CCPR/C/65/D/633/1995

HRC, *Concluding Observations on Cambodia*, 27 July 1999. UN. Doc. CCPR/C/79/Add.10

HRC, *Malcolm Ross v. Canada*, Comm. N. 736/1997, 21 August 2000. UN. Doc. CCPR/C/70/D/736/1997 (2000)

HRC, *Robert Faurisson v. France*, Comm. No. 550/1993, 8 November 1996. UN. Doc. CCPR/C/58/D/550/1993(1996)

HRC, *Siragev v. Uzbekistan*, Comm. No. 907/2000, 1 November 2005. UN. Doc. CCPR/C/85/D/907/2000

HRC, *Toktakunov v. Kyrgyzstan*, Comm. No. 1470/2006, 28 March 2011. UN. Doc. CPR/C/101/D/1470/2006

HRC, *José Vicenté et al. v. Colombia*. Comm. No. 612/1995, 14 June 1994. UN. Doc. CCPR/C/60/D/612/1995

HRC, *Concluding Observations on Central African Republic*, 27 July 2006. UN. Doc. CCPR/C/CAF/CO/2

HRC, *Quinteros et al. v. Uruguay*, Comm. No. 107/1981, 21 July 1983. UN. Doc. CCPR/C/OP/2 at 138 (1990)

ICJ

ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, I.C.J. Reports 2012

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007. I.C.J. Reports 2007

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Judgment of 3 February 2015

ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997

ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I. C. J. Reports 2004

ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1986

ICJ, *Frontier Dispute, (Benin v. Niger)*, Judgment of 12 July 2005, I.C.J. Reports 2005

ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Judgment of 27 June 1986, I.C.J. Reports 1986

ICJ, *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion of 8 June 1996, I.C.J. Reports 1996

Permantent Court of International Justice

P.C.I.J, *Factory at Chorzów, Merits*, Judgment No. 13, 1928, Series A, n° 17

Other Supra-national Bodies

ACommHPR, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, 13-27 October 2001.

CERD, *The Jewish Community v. Norway*, Comm. No. 30/2003, August 2005, U.N. Doc. CERD/C/67/D/30/2003 15

HRCBiH, *Selimović and 48 others against Republika Srpska (Srebrenica cases)*. Admissibility and Merits, Case No. CH/01/8365. Decision of 7 March 2003

Mixed Claim Commission, *Lusitania Cases (United States v. Germany)*, Opinion of 1 November 1923, 7 R.I.A.A.32